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No. 06-

IN THE

Supreme Court of the United States

Detroit Entertainment, L.L.C.,
d/b/a MotorCity Casino, and
Marlene Brown,

Petitioners,

v.

Stella Romanski.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are a private casino and one of its security guards. A jury found that the guard arrested respondent, a guest of the casino, without probable cause. It awarded her compensatory and punitive damages under 42 U.S.C. 1983. The Sixth Circuit held, as a matter of law, that petitioners' conduct constituted "state action" subjecting petitioners to liability under Section 1983. The court rested its decision on a provision of Michigan law authorizing a licensed private security guard with probable cause to arrest an individual on her employer's premises.

The Questions Presented are:

1. Has the Sixth Circuit fundamentally departed from this Court's state action jurisprudence, faithfully applied by other circuits, holding that private conduct that is contrary to state policy does not constitute "state action" for purposes of 42 U.S.C. 1983?

2. Did the Sixth Circuit err in holding, contrary to decisions of other circuits and the Michigan Supreme Court, that an arrest by a private party constitutes state action?

In the event the Court determines not to review the court of appeals' state action holding, the case presents a further question:

3. Should this case be held pending the disposition of No. 05-1256, *Philip Morris USA* v. *Williams*?

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Detroit Entertainment, L.L.C., is partially owned by Atwater Casino Group, L.L.C., which in turn is partially owned by Z.R.X., L.L.C., and IH Gaming, Inc., which in turn are partially owned by CCM Merger, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Detroit Entertainment L.L.C., d/b/a MotorCity Casino, and Marlene Brown respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-38a) is reported at 428 F.3d 629. The opinion of the district court (Pet. App. 39a-62a) is reported at 265 F. Supp. 2d 835.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2005. The court denied a petition for rehearing and rehearing en banc on February 6, 2006. Pet. App. 63a-64a. Justice Stevens subsequently extended the time to file this petition to and including July 6, 2006. App. 05A961. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix (at 65a-70a).

STATEMENT

The lower courts in this case held as a matter of law that a private security guard authorized by state law to make an arrest engaged in "state action" for purposes of 42 U.S.C. 1983 when she arrested respondent without probable cause. That holding followed from settled circuit precedent that finds state action notwithstanding that respondent's claim is that the guard acted *contrary* to state policy, which permits arrest only with probable cause. The court of appeals also upheld an award of $600,000 in punitive damages to respondent on compensatory damages of less than $300.

1. 42 U.S.C. 1983 provides a cause of action against any person "who, under color of any statute, ordinance,

regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution."

Section 1983 liability for violation of the Fourth Amendment attaches only to "state actors." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 924 (1982) (explaining that the Bill of Rights is incorporated as applying to the states by the Fourteenth Amendment, which requires state action). This requirement "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936-37. Conduct attributable to the state for purposes of the Fourteenth Amendment also is "under color of state law" for purposes of Section 1983. *Id.* at 935.

Conduct is "fairly attributable to the State" only if it satisfies two criteria:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. * * * Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar, 457 U.S. at 937.

The content of the first element depends on the nature of the defendant. For governmental employees with the apparent authority to undertake the challenged act, the first element is satisfied even if the defendant violates state policy. *Monroe* v. *Pape*, 365 U.S. 167 (1961).

For private defendants such as petitioners, by contrast, this "abuse of authority" doctrine does not apply. *Lugar*, 457 U.S. at 940. Rather, the elements of the "two-part" test "diverge when the constitutional claim is directed against * * * a private party." *Id.* at 937. In such cases, the first prong of the test requires that the private conduct be

authorized by state law or policy. Mere "private misuse of a state statute does not describe conduct that can be attributed to the State." *Id.* at 941. Thus, in *Lugar*, the plaintiff's Section 1983 suit alleged that the private defendant had seized the plaintiff's property through a misuse of state attachment procedures. This Court held that the defendant's conduct was not "state action" because "the conduct of which petitioner complained could not be ascribed to any governmental decision. * * * That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision." *Id.* at 940.

2. Respondent Stella Romanski brought this suit against petitioners Detroit Entertainment, L.L.C. (a private Detroit casino), Marlene Brown (a casino security guard), and two other security guards. The gravamen of her complaint is that she was wrongfully arrested and detained when she visited the casino on August 7, 2001.

On the date in question, respondent traveled with two friends to the casino to gamble and eat lunch. During a break from playing slot machines, respondent found a five-cent token at an unoccupied machine and brought the token back to the machine that she had been playing earlier. One uniformed male security guard approached her and asked that she accompany him to the office. Petitioner Marlene Brown and two other female security guards – none of whom were uniformed – also approached respondent. After respondent became belligerent, the guards escorted her to the casino security office, where they told her that patrons were prohibited from "slot walking," or taking tokens from machines they had not been playing. This policy had not been posted at the casino. Brown then removed a nickel from respondent's earnings. After guards photographed respondent and photocopied her driver's license and social security card, she was excluded from the casino for six months.

The casino permitted respondent to use the restroom before leaving, accompanied by a security guard who waited

outside the stall, but not to return to the casino floor or eat lunch at the casino's buffet. Instead, the casino directed her to an air-conditioned valet area to wait for her bus. Respondent left the valet area when she mistakenly believed her bus had arrived, and ran into her friends outside. She remained outside in hot and humid weather until her friends persuaded her to reenter the casino. Given her exclusion, casino employees directed her back to the valet area, where she waited with her friends until their bus arrived.

At no time during respondent's detention was she handcuffed, touched, physically threatened, or told she could not leave. While respondent testified that she provided identification and agreed to be photographed because she believed the guards to be police officers, Marlene Brown stated (in testimony that is presumed to be true in the procedural posture of the case) that she showed respondent her casino badge and identified herself as a "security police officer." (Michigan law uses the name "private security police officer" to refer to licensed private guards.) As the dissent below summarized, "[T]he security guards neither threatened nor actually invoked the authority of the state during the incident." See Pet. App. 37a (Farris, J., dissenting) (footnote omitted).

Respondent's initial complaint – removed by petitioners to federal district court – claimed that her detention violated state law and constituted false arrest and imprisonment. The premise of those torts is that the defendants were without legal authority to restrain the plaintiff. See Pet. App. 57a.

Respondent subsequently amended her complaint to allege as well that her unlawful arrest violated Section 1983. Respondent's amended complaint did *not* allege that petitioners' conduct was pursuant to a state policy. To the contrary, as noted, the essence of her "false arrest" claim is that petitioners' conduct was contrary to the requirement that arrests be conducted only upon probable cause. But the omission of such an allegation was consistent with settled

Sixth Circuit case law, under which a Section 1983 suit against a private party need *not* allege that the defendant's conduct was pursuant to a state policy. See, *e.g.*, *Ellison* v. *Garbarino*, 48 F.3d 192, 195 (1995); *Wolotsky* v. *Huhn*, 960 F.2d 1331, 1334-35 (1992); see also *Chapman* v. *The Higbee Co.*, 319 F.3d 825, 833 (2003) (en banc) (ratifying this approach six months after respondent amended her complaint and three months before the district court ruled on the state action question).

Respondent accordingly simply alleged that petitioners' actions were under color of state law because Michigan law confers the power of arrest on petitioner Brown. A properly licensed private security police officer on his employer's premises "has the authority to arrest a person without a warrant" in circumstances that an actual police officer would be permitted to make such an arrest. Mich. Comp. Laws 338.1080. There are limits on that power, however. "Such authority is limited to his or her hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer." *Ibid.* Casino security guards are moreover prohibited from carrying firearms or other weapons on casino premises. Michigan Gaming Control and Revenue Act (MGCRA) Rule 432.1212.

3. Petitioners sought to dismiss respondent's Section 1983 claim on the ground that the casino and its employees were not state actors. The district court disagreed, holding that petitioners were state actors as a matter of law because petitioner Brown initiated respondent's detention while on duty as a licensed guard with the same arrest authority as a police officer. Pet. App. 47a-53a. The district court relied upon Sixth Circuit precedent holding that the conduct of private party deemed to be a "state actor" constitutes state action, without regard to whether the challenged conduct was in fact pursuant to a state policy. See *id.* 48a (citing *Chapman*, 319 F.3d at 833).

On this basis, and over petitioners' objections, the judge instructed the jury to find that petitioners had acted under color of law during the incident. The court instructed, "'Acting under color of law in this case simply means acting in one's capacity as a licensed security officer with powers to make an arrest on the casino premises.'" Pet App. 8a. The judge further instructed the jury that petitioners could be found liable for false arrest and violating respondent's Fourth Amendment rights only if petitioners lacked probable cause to detain respondent. *Id.* 20a.

The jury returned a verdict for respondent. It found that the casino had falsely arrested and falsely imprisoned respondent in violation of state law. In turn, it ruled for respondent on the ground that the casino had violated respondent's Fourth Amendment rights under color of state law. It awarded respondent compensatory damages of $279.05. Based solely upon the Section 1983 claim, the jury also awarded $875,000 in punitive damages against the casino and $500 in punitive damages against petitioner Brown.

4. Petitioners appealed the state action finding. Constrained by a line of settled precedent (including the *en banc* ruling in *Chapman*, *supra*), petitioners did not maintain that the district court's ruling was erroneous on the ground that their conduct was contrary to state policy. Rather, they made the only argument available to them under Sixth Circuit law: that they were not "state actors." The Sixth Circuit affirmed in a divided disposition.

The court of appeals first noted that this Court has expressly left open the question of when private security guards qualify as state actors on the theory that they are exercising powers traditionally reserved to the state, and that the issue has given rise to a "growing body of case law" in the lower courts. Pet. App. 10a (citing *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 (1978)).

The Sixth Circuit rested its decision on its settled circuit precedent holding that private conduct is fairly attributable to

the State, and is actionable under Section 1983, so long as the conduct satisfies any one of "three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, or (3) the symbiotic relationship or nexus test." Pet. App. 9a (internal quotation marks omitted) (citing *Chapman*, 319 F.3d 833). Applying the public function test in this case, the Sixth Circuit held that because "at all times relevant to this case," Brown had "the authority to make arrests at [her] discretion and for any offenses, she "was a state actor as a matter of law." *Id.* 13a (footnote omitted). The court afforded no weight to the facts that security guards possessed this arrest power only at limited times and places and that detention under the circumstances of this case was not solely a state prerogative at common law. The court explained that the relevant question was simply whether the casino guards possessed plenary arrest power at the time of respondent's detention. The court stated that it

> focused on the specific powers that Brown, in her capacity as an on-duty and licensed private security officer, had at her disposal. Because at least one of these powers, the plenary arrest power, is "traditionally the exclusive prerogative of the state," and because it is undisputed that Brown was in fact licensed under M.C.L. § 338.1079 and was in fact on duty at all times relevant to this case, the district court correctly held that Brown was a state actor as a matter of law.

Id. 17a (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

The Sixth Circuit also agreed that substantial punitive damages were warranted, but directed the district court to order a remittitur of $600,000 in punitive damages against Detroit Entertainment, L.L.C. (Respondent accepted the remittitur on remand.) The court described the 3135-to-1 ratio of punitive-to-compensatory damages below as

"unusually high," and noted that analogous cases elsewhere had found that seemingly more serious conduct could support only significantly smaller punitive awards. Pet. App. 25a, 28a (citing remittitur of $75,000 for malicious prosecution in *Lee* v. *Edwards*, 101 F.3d 805 (CA2 1996) and remittitur of $75,000 in *Disorbo* v. *Hoy*, 343 F.3d 172, 187 (CA2 2003), involving severe beating by police officer). It also held that petitioners did not have fair notice that a penalty as great as $875,000 could result from their conduct. Further, it noted that respondent did not suffer physical injury and there was no evidence the casino had engaged in similar detentions previously. Nevertheless, the court deemed $600,000 in punitive damages – 2150 times the amount of compensatory damages – appropriate because Detroit Entertainment is a wealthy business entity, respondent's injuries lacked ready monetary value, and the court deemed petitioners' treatment of respondent to be egregious and reprehensible. *Id.* 21a-34a.

5. Judge Farris dissented, reasoning that security guards' plenary arrest authority does not render them state actors. The dissent noted that respondent had "presented no evidence that the State of Michigan has traditionally and exclusively reserved the power to make warrantless arrests." Pet. App. 36a. To the contrary, citizens with arrest authority are not necessarily state actors when their authority is limited to particular times and places, and when the citizens at issue possess far narrower powers than police officers. Judge Farris found it noteworthy that the majority's state action holding conflicted with a decision of the Michigan Supreme Court, and that a contrary result also appeared warranted under Seventh Circuit jurisprudence. Pet. App. 34a n.7, 35a (Farris, J., dissenting) (citing *City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (Mich. 1982); *Wade* v. *Byles*, 83 F.3d 902, 904 (CA7 1996)).

After the Sixth Circuit denied rehearing and rehearing en banc, this petition followed.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's State Action Jurisprudence Is Fundamentally Inconsistent With This Court's Precedents.

The court of appeals rested its decision in this case on settled Sixth Circuit precedent holding that a private defendant engages in "state action" if any of the three tests for identifying a "state actor" is satisfied. The precedent writes out of existence the first element of the "state action" inquiry adopted by this Court. This Court's precedents dictate the conclusion that, because the very essence of respondent's suit is that the private petitioners in this case were acting in violation of state law when they arrested respondent without probable cause, petitioners' conduct was not pursuant to a state policy and does not constitute "state action."

1. Private conduct that causes the deprivation of a federal right constitutes actionable "state action" only if it is "fairly attributable to the State." See *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). As correctly described by one court of appeals, the "fair attribution test has two components: a state policy and a state actor." *Roudybush* v. *Zabel*, 813 F.2d 173, 176 (CA8 1987). The first component focuses on whether the challenged *conduct* was attributable to a state policy whereas the second component focuses on whether the *defendants* are fairly affiliated with the State.

Specifically, the "[f]irst" requirement is that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be [i] because he is a state official, [ii] because he has acted together with or has obtained significant aid from state officials, or [iii] because his conduct is otherwise chargeable to the State." *Ibid.*

Lugar stressed that these two components, though related, are distinct in cases involving private defendants. The two "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions," but "[t]he two principles diverge when the constitutional claim is directed against a party without such apparent authority, *i.e.*, against a private party." 457 U.S. at 937.

In *Lugar*, one of the debtor-plaintiff's claims was that the creditor-defendants had attached his property in violation of the state's prejudgment attachment statute. See 457 U.S. at 940. This Court held that the claim did not satisfy the state policy component of the "fair attribution" inquiry:

> Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, opressive [sic], [and] unlawful acts." By "unlawful," petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i.e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe* v. *Pape*, [365 U.S. 167 (1961)]. That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

Lugar, 457 U.S. at 940 (last alteration added).

This Court has repeatedly reiterated the distinct components of the state action inquiry. See, *e.g.*, *Georgia* v. *McCollum*, 505 U.S. 42, 50-51 (1992); *Edmonson* v. *Leesville*

Concrete Co., 500 U.S. 614, 620 (1991). Thus, in *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999), this Court was confronted by an attempt to avoid the second component of the *Lugar* inquiry. This Court chastised the respondents for

> ignor[ing] our repeated insistence that state action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar*[, 457 U.S. at 937.]

Sullivan, 526 U.S. at 50 (emphasis in original).

Other circuits faithfully apply the principle that the private misuse of a state statute does not create state action for purposes of Section 1983. See generally *Wyatt* v. *Cole*, 994 F.2d 1113, 1117-18 (CA5 1993) (collecting cases). Those courts regularly reject claims for failure to satisfy the first element of the state action inquiry. *Yanaki* v. *Biomed, Inc.*, 415 F.3d 1204, 1207-10 & n.11 (CA10 2005); *Federer* v. *Gephardt*, 363 F.3d 754, 759 (CA8 2004); *Gonzalez-Morales* v. *Hernandez-Arencibia*, 221 F.3d 45, 49-51 (CA1 2000); *Gene Thompson Lumber Co.* v. *Davis Parmer Lumber Co.*, 984 F.2d 401, 403-04 (CA11 1993); *Collins* v. *Womancare*, 878 F.2d 1145, 1153 (CA9 1989); *Roudybush* v. *Zabel*, 813 F.2d 173, 176-78 (CA8 1987); *Greco* v. *Guss*, 775 F.2d 161, 165-66 (CA7 1985); *Dahlberg* v. *Becker*, 748 F.2d 85, 90-91 (CA2 1984); *Kolinski* v. *Lubbers*, 712 F.2d 471, 477-78 (CADC 1983).

Illustrative is the Ninth Circuit's holding that private parties are not amenable to suit under Section 1983 for exceeding their authority under a California citizen's arrest statute, relying expressly upon *Lugar*'s holding that private misuse of a state statute does not satisfy the state policy component of the "fair attribution" requirement. See

Womancare, 878 F.2d at 1150-53. *Womancare* emphasized that the Supreme Court "ha[d] made it clear * * * that [the] 'abuse of authority' doctrine does not apply if the challenged action is one undertaken by a *private party* rather than a state official." *Id.* at 1152 (citing *Lugar*, 457 U.S. at 940).[1]

2. By contrast, for over a decade, the Sixth Circuit has nonetheless consistently refused to apply the distinct first element of the state action inquiry in Section 1983 suits against private defendants. The Sixth Circuit instead consistently equates the second component of the state action inquiry with the ultimate question of whether private conduct is "fairly attributed" to the state, abrogating the required inquiry into whether the alleged deprivation of the plaintiff's rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937.

The Sixth Circuit's departure from *Lugar* began with *Wolotsky* v. *Huhn*, 960 F.2d 1331 (1992), which recited its understanding of the law as follows:

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[1] In a leading case pre-dating *Lugar*, the Ninth Circuit, sitting en banc, held that a private bail bondsman could not be sued under Section 1983 for arresting the plaintiff in violation of the relevant California laws governing bail bondsmen, concluding that the actions of private parties were "clearly not under the color of California law" when that law did not "authorize, permit, encourage or tolerate the conduct of the" bail bondsman. See *Ouzts* v. *Maryland Nat'l Ins. Co.*, 505 F.2d 547, 553-55 (1974) (en banc). Anticipating *Lugar*'s recognition that private parties do not "have the authority of state officials to put the weight of the State behind their private decision," *Lugar*, 457 U.S. at 940, *Ouzts* rejected the plaintiff's invocation of the "abuse of authority" doctrine, distinguishing cases in which the doctrine had been applied as cases in which "the offenders were either actual state officials * * * or they were jointly engaged in activity with actual state officials," 505 F.2d at 554.

> The principal inquiry in determining whether a private party's actions constitute "state action" under the Fourteenth Amendment is whether the party's actions may be "fairly attributable to the state." *See Lugar*[, 457 U.S. at 937]. The Supreme Court has set forth three tests to determine whether the challenged conduct may be fairly attributable to the state in order to hold the defendants liable under section 1983. These tests are: (1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test.

960 F.2d at 1334-35 (citations omitted).

The three tests cited by the court in *Wolotsky* are, in fact, merely different formulations of the second component of the *Lugar* test. See *Lugar*, 457 U.S. at 938-39 (explaining that this Court has articulated several different formulations of the second component of the "fair attribution" inquiry, including all three tests listed in *Wolotsky*). In other words, these tests are directed at the question whether the defendants are fairly affiliated with the State, *not* at whether the challenged conduct is authorized by state law or policy. Thus, by equating the ultimate state action inquiry with these various tests, the Sixth Circuit in *Wolotsky* abrogated the distinct inquiry into whether the challenged conduct is authorized by state law or policy.

In the fourteen years since *Wolotsky*, an uninterrupted line of published Sixth Circuit precedent has applied the same rule. Soon after *Wolotsky*, the Sixth Circuit stated that it "recognize[d] three tests for determining whether private conduct is fairly attributable to the state: the public function test, the state compulsion test, and the nexus test." *Ellison* v. *Garbarino*, 48 F.3d 192, 195 (1995) (citing *Wolotsky*, 960 F.2d at 1335); see also *Wittstock* v. *Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (2003); *Tahfs* v. *Proctor*, 316 F.3d 584, 591 (2003); *Lansing* v. *City of Memphis*, 202 F.3d 821, 828 (2000); *Collyer* v. *Darling*, 98 F.3d 211, 231-32 (1996).

These decisions culminated in an en banc Sixth Circuit decision:

> A private party's actions constitute state action under section 1983 where those actions may be "fairly attributable to the state." *Lugar*[, 457 U.S. at [937]]. The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test.

Chapman v. *The Higbee Co.*, 319 F.3d 825, 833 (2003) (en banc) (citing *Wolotsky*, 960 F.2d at 1335). The en banc court in *Chapman* reversed the district court's grant of summary judgment for the defendants on the state action question and remanded for further proceedings simply because there were material issues of fact pertaining to the so-called nexus test, see 319 F.3d at 834-35, without any regard for whether the state policy component of *Lugar* had also been satisfied.[2] Relying upon the court of appeals' settled precedent, district courts within the Sixth Circuit similarly do not apply the first element of the state action inquiry.[3]

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[2] Three published Sixth Circuit decisions since *Wolotsky* acknowledge that *Lugar*'s "fair attribution" inquiry has two parts. But those decisions nonetheless explicitly state that the two elements are embodied in the three "tests" that are, in fact, the *second* element of the *Lugar* inquiry. See *Wittstock*, 330 F.3d at 902; *Tahfs*, 316 F.3d at 590-91; *Lansing*, 202 F.3d at 828.

[3] See *Eckmeyer* v. *Brimfield Twp. Bd. of Trs.*, 2006 WL 1644377, at *3-*6 (N.D. Ohio June 12, 2006); *R.R.* v. *Bd. of Educ. of Kingsport City*, 2006 WL 1211163, at *3-*4 (E.D. Tenn. Apr. 28, 2006); *Hopson* v. *Wal-Mart*, 2006 WL 939004, at *2-*3 (W.D. Ky. Apr. 10, 2006); *Daniels* v. *Retired Senior Volunteer Program*, 2006 WL 783438, at *3-*6 (S.D. Ohio Mar. 27, 2006); *Boykin* v. *Van Buren Twp.*, 2006 WL 305751, at *8-*11 (E.D. Mich. Feb. 9, 2006); *Saalman* v. *Reid*, 2006 WL 278412, at *3-*4 (S.D. Ohio Feb. 3, 2006); *Wilcher* v. *City of Akron*, 2005 WL 3338378, at *2-

*4 (N.D. Ohio Dec. 8, 2005); *Gant* v. *Bowles*, 2005 WL 2994443, at *3-*4 (M.D. Tenn. Nov. 3, 2005); *Brewster* v. *Cooper Indus.*, 2005 WL 2403734, at *7 (E.D. Ky. Sept. 28, 2005); *Friedrich* v. *Southeast Christian Church of Jefferson County*, 2005 WL 2333633, at *1-*3 (W.D. Ky. Sept. 22, 2005); *Atkins* v. *Garcia Lab., Inc.*, 2005 WL 2173542, at *2 (E.D. Mich. Sept. 1, 2005); *Piper* v. *R.J. Corman R.R. Group*, 2005 WL 1523566, at *6-*7 (E.D. Ky. June 28, 2005); *Young* v. *City of Sandusky*, 2005 WL 1491219, at *3-*4 (N.D. Ohio June 23, 2005); *Benford* v. *Smith*, 2005 WL 1325003, at *2-*3 (E.D. Tenn. June 3, 2005); *Farmer* v. *Pike County Agric. Soc'y*, 411 F. Supp. 2d 838, 844-45 (S.D. Ohio 2005); *Oliver* v. *City of Memphis*, 2004 WL 3316242, at *4-*5 (W.D. Tenn. Dec. 2, 2004); *Smith* v. *Detroit Entm't LLC*, 338 F. Supp. 2d 775, 786-92 (E.D. Mich. 2004); *Kennedy* v. *Bank One Corp.*, 2002 WL 31008340, at *2 (E.D. Mich. Aug. 15, 2002); *Barbee* v. *Wal-Mart Stores, Inc.*, 2002 WL 1784318, at *2 & n.3 (W.D. Tenn. July 16, 2002); *McCord* v. *City of Columbus*, 225 F. Supp. 2d 804, 810 (S.D. Ohio 2002); *Canter* v. *Hardy*, 188 F. Supp. 2d 773, 795-97 (E.D. Mich. 2002); *Thompson* v. *City of Columbus*, 2001 WL 1681129, at *6-*7 (S.D. Ohio Sept. 26, 2001); *Siskaninetz* v. *Wright State Univ.*, 175 F. Supp. 2d 1018, 1022-27 (S.D. Ohio 2001); *Hayes* v. *Allstate Ins. Co.*, 95 F. Supp. 2d 832, 835-36 (W.D. Tenn. 2000); *Cmtys. for Equity* v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 738-40 (W.D. Mich. 2000); *Williams* v. *Payne*, 73 F. Supp. 2d 785, 798-802 (E.D. Mich. 1999); *Durso* v. *Kentucky Ass'n of Counties, Inc.*, 32 F. Supp. 2d 929, 931-33 (E.D. Ky. 1999); *Kelly* v. *Forest Hills Local Sch. Dist. Bd. of Educ.*, 19 F. Supp. 2d 797, 801-02 (S.D. Ohio 1998); *Black* v. *Barberton Citizens Hosp.*, 8 F. Supp. 2d 697, 700-01 (N.D. Ohio 1998); *Sanders* v. *Prentice-Hall Corp. Sys., Inc.*, 969 F. Supp. 481, 484-86 (W.D. Tenn. 1997); *Rudy* v. *Vill. of Sparta*, 990 F. Supp. 924, 930-31 (W.D. Mich. 1996); *Holley* v. *Deal*, 948 F. Supp. 711, 715 (M.D. Tenn. 1996); *Perdue* v. *Quorum Health Resources, Inc.*, 934 F. Supp. 919, 922-23 (M.D. Tenn. 1996); *Graham* v. *Tennessee Secondary Sch. Athletic Ass'n*, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995); *Worrall* v. *Irwin*, 890 F. Supp. 696, 702-04 (S.D. Ohio 1994); *Lintz* v. *Skipski*, 807 F. Supp. 1299, 1305-06 (W.D. Mich. 1992).

3. The opinion below represents the latest installment in the Sixth Circuit's abrogation of *Lugar*. Citing *Chapman* and *Wolotsky*, the decision below again equates the "fair attribution inquiry" with only the second element of the state action test. The Sixth Circuit cited this Court's decision in *Lugar*, but applied the Sixth Circuit's settled rule abrogating the first element of the two-part test announced by this Court. The Sixth Circuit held:

> A private actor acts under color of state law when its conduct is "fairly attributable to the state." *Lugar*[, 457 U.S. at [937]]. "The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test."

Pet. App. 9a.

The court of appeals' rule affords no weight to the fact that a private defendant's conduct was not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. Rather, based only on its determination that petitioners had exercised the public function of arrest, the court concluded that the plaintiffs had satisfied the state action requirement of Section 1983. Thus, as in its en banc decision in *Chapman*, the Sixth Circuit ruled in favor of a Section 1983 plaintiff without regard to whether the state policy component of *Lugar* had been satisfied.

It is clear that unless this Court grants review, the Sixth Circuit will continue to disregard the first prong of *Lugar* in Section 1983 suits against private defendants. This case perfectly illustrates the seriousness of the court of appeals' error. In this case, the "deprivation" of respondent's rights is not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Ibid.* Mere

"private misuse of a state statute does not describe conduct that can be attributed to the State." *Lugar*, 457 U.S. at 941.

Respondent's complaint, like the complaint in *Lugar*, alleges merely that a private party had misused a state statute. The gravamen of respondent's Fourth Amendment claim is that she was arrested without probable cause because the token she picked up was abandoned property. See Pet. App. 6a. But Michigan undoubtedly did not authorize petitioner Brown to arrest respondent in the absence of probable cause: As a private security police officer, petitioner Brown was authorized, pursuant to Michigan Compiled Laws (MCL) § 338.1080, only "to arrest a person without a warrant as set forth for public peace officers in [MCL § 764.15]." And, unsurprisingly, Section 764.15, while setting forth multiple grounds under which Michigan police officers are authorized to make warrantless arrests, does not authorize the arrest of a person who has not committed a crime and whom the officer has no reasonable cause to believe has committed a crime. Thus, respondent's Fourth Amendment claim challenges no more than the "private misuse of a state statute," *Lugar*, 457 U.S. at 941, as petitioner Brown was "acting contrary to the relevant policy articulated by the State," *id.* at 940. Because her alleged "invoc[ation of] the statute without the grounds to do so c[an] in no way be attributed to a state rule or a state decision," *ibid.*, the state policy component of *Lugar* is not satisfied.[4]

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[4] The Sixth Circuit's abrogation of the *first* element of this Court's state action test is not excused on the ground that petitioners were allegedly performing a "public function" under the *second* element. As *Lugar* explains, although claims involving government employees need not satisfy the first element, this "apparent authority" doctrine derived from *Monroe* v. *Pape* does not apply to private defendants. Consistent with *Lugar*, *Womancare*, and *Ouzts*, *supra*, petitioners' review of the post-*Lugar* appellate precedents has not revealed a single published federal circuit court opinion applying the "abuse of authority"

Certiorari accordingly should be granted to correct the Sixth Circuit's consistent abrogation of the first element of this Court's holding in *Lugar*. The Court may wish to consider summary reversal.[5]

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doctrine to hold a private party liable for conduct not involving also governmental entities. Only two cases hold private defendants liable under Section 1983 for misuse of a state statute; in both, the private parties acted jointly with state officials. See *Greco* v. *Guss*, 775 F.2d 161, 165-69 (CA7 1985); *Howerton* v. *Gabica*, 708 F.2d 380, 384 n.9 (CA9 1983). Thus, in both, the private defendants did "have the authority of state officials to put the weight of the State behind their private decision." *Lugar*, 457 U.S. at 940.

There was no such involvement by any state official in this case. The mere fact that petitioner Brown was licensed as a private security police officer under Michigan Compiled Laws § 338.1079 is insufficient to implicate the "abuse of authority" doctrine, as the license only granted Brown authority to make arrests pursuant to Michigan Compiled Laws § 764.15: if private misuse of a statute is not state action under *Lugar*, neither is private misuse of a license simply granting permission to use a statute; in both cases, the defendant is acting "contrary to the relevant policy articulated by the State." *Lugar*, 457 U.S. at 940.

[5] Petitioners principally argued in the district court and on appeal that their conduct did not constitute state action subject to suit under Section 1983. That argument is sufficient to preserve for review in this Court the subsidiary contention that respondent's claim was precluded by the first prong of the state action inquiry. Petitioners could not reasonably be expected to press that particular argument in the face of a wall of on-point, settled circuit precedent (including the en banc decision in *Chapman*). Indeed, no defendant can be expected to make such an argument in that court. But in any event, this Court may decide the question so long as it was "passed upon" by the court of appeals (*Verizon Comms.* v. *FCC*, 535 U.S. 467, 531 (2002)), which it was. The Sixth Circuit rested its holding squarely on its precedent holding that state action is present so long as one of the three tests for establishing that the defendant is a "state actor" under the second prong of the state action inquiry. See *supra* at 6-8.

II. Certiorari Is Warranted To Resolve The Circuit Split Regarding Whether An Individual Becomes A State Actor Under The Second Prong Of *Lugar* By Virtue Of Possessing Arrest Authority.

A. The Lower Courts Are Divided over Whether the State-Conferred Power to Arrest Transforms Private Security Guards into State Actors.

This Court has left open the question of how, or whether, a private individual is subject to constitutional tort liability based upon state-sanctioned authority to perform police-type functions. See *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 n.14 (1978); see also Pet. App. 10a. That question has divided the circuits. The Sixth Circuit holds that "the authority to make arrests at one's discretion and for any offenses" renders the possessor "a state actor as a matter of law," because plenary arrest power is "traditionally reserved to the state alone." Pet. App. 13a-14a (footnote omitted). This holding is squarely at odds with the reasoning and result of decisions of three other circuits and several state courts, including a holding of the Supreme Court of Michigan addressing the very statute at issue here. These other courts hold that the arrest power falls outside the sphere of state action because arrest has also traditionally been the prerogative of private citizens, and that private security guards do not become police officers merely by virtue of statutory arrest authority.

1. Substantial authority in both state and federal courts draws a clear line for state action purposes between arrests by *citizens* (such as petitioner Brown) and arrests by *police officers*. Unlike the ruling below, these decisions recognize that neither possession nor exercise of arrest authority transforms private parties into state actors, and discredit the notion that arrest is a "traditional public function."

The Fifth, Seventh, and Tenth Circuits have all expressly refused to conflate a citizen's power of arrest with that of a police officer. The Fifth Circuit in *White* v. *Scrivner Corp.*

rejected a Section 1983 lawsuit against a grocery-store chain and its employees, holding that the public function test is not satisfied when the employees searched the plaintiffs on suspicion of shoplifting and detained them after the search turned up a handgun, but no stolen property. 594 F.2d 140, 141 (1979). The court held that "[w]hile these actions are usually performed by police officers. private citizens do occasionally engage in them. * * * Once the defendants found the gun, detention of the women until the arrival of the police was * * * not an action outside the realm of common experience." *Id.* at 143.

Likewise, in *Carey* v. *Continental Airlines, Inc.*, the Tenth Circuit held that a citizen's arrest for trespassing did not constitute state action under Section 1983, explaining that "[i]f [defendant Gary] Gilbert himself made a 'citizen's arrest' of [plaintiff Daniel] Carey, as Carey asserts, this does not make Gilbert a state actor." 823 F.2d 1402, 1404 (1987). The Tenth Circuit has furthermore read its decision in *Carey* to support the conclusion that private security guards cannot meet the traditional public function test. See *Gallagher* v. *Neil Young Freedom Concert*, 49 F.3d 1442, 1457 (1995) ("[O]ur conclusion that private citizens making arrests were not state actors because they did not act in concert with state officials suggests that the mere performance of security functions such as those here at issue is not traditionally an exclusive function of the state.").

The Seventh Circuit has similarly stated that arrest authority is not a public function, because it was traditionally shared by private and public actors due to the tradition of citizen's arrests. In *Wade* v. *Byles*, 83 F.3d 902, 906 (1996), the Seventh Circuit held that powers granted by the City of Chicago to a municipal security guard, including the authority to arrest trespassers, did not make him a state actor. The Seventh Circuit noted that such powers had not been "*exclusively* reserved to the police," citing an Illinois statute "providing for citizens' arrests" and caselaw "noting that powers of arrest and self-defense are not exclusively

governmental functions." *Ibid.*; see also *Payton* v. *Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 623, 629 (CA7 1999) ("[C]itizen's arrests * * * are available to individuals outside of the law enforcement community * * *.").

The decision below is similarly in conflict with the Supreme Court of Michigan's decision in *City of Grand Rapids* v. *Impens*, 327 N.W.2d 278 (1982), a case involving the same Michigan statute at issue here. In *Impens*, a criminal defendant sought to suppress a statement to licensed security guards on the ground that the guards had not warned him of his *Miranda* rights. *Id.* at 279. The Michigan Supreme Court rejected the defendant's argument – parallel to respondent's argument in this case – that "the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law." *Id.* at 281. The court explained that the statutes' grant of authority to private security guards is merely "an extension of the commonlaw shopkeepers' privilege to detain for a reasonable period of time a person suspected of theft or failure to pay." *Ibid.*[6]

Several other state courts have reached results in accord with *White*, *Carey*, and *Impens*, and therefore in conflict with the Sixth Circuit's holding here. See *State* v. *Kemp*, 205 So. 2d 411, 415 (La. 1967) (refusing to consider suppressing evidence obtained in citizens' arrest for shotgun assault because "[t]he arrests in question were made by private persons—not by officials"); *Hood* v. *Commonwealth*, 448 S.W.2d 388 (Ky. 1969) (holding *Miranda* warnings were not

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[6] The decision below unpersuasively attempts to distinguish *Impens* by stating that *Impens*, unlike the present case, did not involve involuntary detention. Pet. App. 13a n.2. In fact, *Impens* unequivocally states that the security guards obtained the contested statements "in a *custodial* environment," 372 N.W.2d at 280 (emphasis added), and expressly refers to the suspect's "detention," *id.* at 281.

required when citizens arrested suspects in barn burnings, because citizens were not state actors); *Hubbard* v. *State*, 234 A.2d 775, 779 (Md. App. 1967), cert. denied, 393 U.S. 889 (1968) (holding that no *Miranda* warnings were required when suspected rapist made statements to pharmacists who were detaining him); *Commonwealth* v. *Corley*, 491 A.2d 829 (Pa. 1985) (holding exclusionary rule inapplicable to citizen's arrest due to absence of state action).

2. In addition to the conflict over whether arrest power is an exclusively public function, the Sixth and Seventh Circuits moreover exhibit a deep and intractable conflict regarding the separate question whether a private individual must also have *other* police powers besides arrest in order to be considered a state actor. The Seventh Circuit has determined that security guards qualify as state actors based upon the public function test only when – unlike petitioners here – they are "entrusted with *all* the powers possessed by the police." *Payton*, 184 F.3d at 630 (emphasis added). Thus, the Seventh Circuit has held that guards merely "authorized to carry a handgun, arrest people for criminal trespass pending arrival of the police, and use deadly force in self-defense" could not qualify as state actors, because as a result of these limitations and the spatial confinement of their authority to the lobbies in which they worked, the court was not "faced with a situation where a state has delegated its entire police power to a private police force." *Wade*, 83 F.3d at 905-06. Petitioners here would have prevailed under the Seventh Circuit's test, as it cannot be disputed that their authority is substantially more limited than that of a fully vested officer of the law.

The decision below, relying primarily on *Payton* v. *Rush-Presbyterian-St. Luke's Medical Center*, erroneously purports to be in accord with the jurisprudence of the Seventh Circuit. *Payton*, however, found state action only in the extreme circumstances in which "*no legal difference exist[ed]*" between a private security guard and a "regular Chicago police officer." 184 F.3d at 630 (emphasis added). In particular, *Payton* involved city ordinances designating the

defendants as "special police officers." See *id.* at 624-25. They were subject to all the rules and regulations applicable to ordinary police officers, reported to the superintendent of police as the superintendent required, wore police-issued badges, and "possess[ed] the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged." *Id.* at 625.

Petitioner Brown, by contrast, unquestionably did not possess the full panoply of police authority. Her arrest power was expressly limited to the boundaries of her employer's property and her hours of employment. Mich. Comp. Laws 338.1080. Thus, she could not, for example, pursue a fleeing suspect outside the casino or arrest anyone during her off-hours. The statute moreover expressly seeks to differentiate her authority from that of an ordinary police officer by requiring that she be in a special uniform when making an arrest. *Ibid.* The uniform cannot be one that would "deceive or confuse the public or be identical with that of a law enforcement officer," and must include shoulder patches at least three inches by five inches in size that clearly designate the name of the private employer. *Id.* § 338.1069(1). Petitioner Brown was also prohibited by state regulation from carrying or wielding a weapon during the exercise of her security duties. See MGCRA Rule 432.1212. Unlike in *Payton*, therefore, there exist significant "legal difference[s]" between petitioners' authority as private citizens and police officers' authority as public officials. 184 F.3d at 630.

Indeed, the Seventh Circuit itself, in a subsequent decision, rejects the notion that even the extensive regulatory scheme present in *Payton* is per se sufficient to subject private security personnel to constitutional liability. In *Johnson* v. *LaRabida Children's Hospital*, 372 F.3d 894, 897-98 (2004), the court found that a hospital guard made a special police officer under the Chicago ordinance was not, in fact, a state actor for purposes of Section 1983. The court based its holding on the limited nature of the defendant's hospital-patrol duties, concluding that "this is not a case where the

state had delegated its entire police power to a private police force." *Id.* at 898 (internal alterations and quotation marks omitted). Neither is the present case, and the Seventh Circuit would consequently have barred respondent's Section 1983 suit.

The conflict presented by this case has important practical dimensions that call for this Court's intervention. The split of authority between Michigan and the Sixth Circuit as to the effect of the Michigan statute is intractable. Though the highest court of the state would not consider petitioners to be state actors, respondent and others similarly situated can avoid the effect of this conclusion by suing under Section 1983 and invoking federal question jurisdiction.

Additionally, the split among the circuits creates great unfairness for a substantial number of potential defendants. The private security industry is large and growing, employing a significant segment of the American workforce. See, *e.g.*, *Impens*, 327 N.W.2d at 681 (Kavanagh, J., dissenting). As this case well illustrates, security guards and their employers in the Sixth Circuit can be subjected to massive constitutional tort liability, including prohibitive punitive damage awards that might be unavailable under state law. Those in the Fifth, Seventh, and Tenth Circuits cannot. Those in circuits yet to resolve the question face the specter of such liability. Only this Court can bring resolution to this important and recurring issue.

B. The Sixth Circuit's Decision Is Incorrect Under This Court's Precedents Governing State Action.

The decision below cannot be reconciled with this Court's precedents limiting private parties' liability for constitutional violations. In order to violate the Fourteenth Amendment and therefore be held liable under Section 1983, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The court below held that petitioners are state actors as a matter of law because they perform a

public function through their arrest authority. See Pet. App. 13a-14a.

That conclusion is irreconcilable with this Court's precedents. As this Court stated in *Jackson* v. *Metropolitan Edison Co.*, private parties are state actors on the basis of the public function test only if they exercise a power that has "traditionally" been "exclusively reserved to the state." 419 U.S. 345, 352 (1974). This category is limited: "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978). Arrest power lies far afield of the limited set of functions that this Court has recognized as "public" for state action purposes. Compare, *e.g.*, *Evans* v. *Newton*, 382 U.S. 296 (1966) (municipal park); *Terry* v. *Adams*, 345 U.S. 461 (1953) (election); *Marsh* v. *Alabama*, 326 U.S. 501 (1946) (company town); *Nixon* v. *Condon*, 286 U.S. 73 (1932) (election).

Critically, the power to effect arrest has not historically been "exclusively reserved to the state." *Jackson*, 419 U.S. at 352. "[N]o aspect of policing, neither patrol nor detection, has ever been 'exclusively' performed by the government, and all have at one point or another been left largely to private initiative." David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1259 (1999). First, many jurisdictions have long protected by statute the right of guards or others to make arrests under some circumstances, as Michigan does. *Id.* at 1184. Second, in other jurisdictions, the authority of officers and citizens has traditionally been virtually identical with respect to warrantless arrests. *Ibid.* "The difference between the arrest powers of police officers and private citizens, then, comes down to this: a private citizen, unlike a police officer, is liable for false arrest if he or she arrests someone based on probable cause to believe the arrestee committed a felony, but it turns out that the felony had not actually been committed." *Id.* at 1185. Finally, even this minimal distinction between the arrest powers of officers and ordinary citizens "was not always drawn, and not all states draw it today." *Id.* at 1185.

Because arrest authority has been and remains a function shared by citizens and police officers, certiorari is warranted to correct the Sixth Circuit's erroneous holding that private citizens are state actors simply because they possess arrest authority.

III. The Punitive Damages Imposed By The Decision Below Violate Due Process.

In the event that this Court concludes that the state action issues presented above do not warrant review, it should at the very least hold the petition pending its decision in *Philip Morris USA* v. *Williams*, No. 05-1256, as the judgment of the Sixth Circuit also raises a serious question about the constitutionality of the punitive damages award imposed and *Philip Morris* will provide guidance for answering that question.[7]

The Sixth Circuit, although reducing the $875,000 punitive damage award imposed by the jury, nevertheless gave respondent the option (which she subsequently accepted) of a $600,000 remittitur. See Pet. App. 34a. Because the compensatory damages in this case were only $279.05, see *id.* 8a, the Sixth Circuit sanctioned an award of punitive damages that was more than 2150 times the damages actually suffered by respondent.

The court justified its extraordinary holding based on essentially four factors: First, it emphasized what it perceived to be an "inexplicable and egregious" temporary detention, interrogation, and humiliation of an elderly woman following her use of an abandoned five-cent token. See Pet. App. 23a-25a. Second, it quoted this Court's passing statement that higher ratios may be permissible when particularly egregious conduct causes only minimal actual damages. See *id.* 27a

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[7] In the event the Court grants certiorari to decide the state action question, it could simply note in its opinion if appropriate that on remand the court of appeals should reconsider its punitive damages holding in light of this Court's decision in *Philip Morris*.

(quoting *BMW of North America* v. *Gore*, 517 U.S. 559, 582 (1996)). Third, it compared punitive damage awards in similar cases. See *id.* 26a-31a. Fourth, it relied upon the fact that the defendant was a wealthy casino. See *id.* 29a-30a, 33a.

It is certainly true that this Court has twice noted in dicta that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 425 (2003) (quoting *Gore*, 517 U.S. at 582). That this Court stated only that some higher ratios *may* comport with due process, however, signals that even in cases with low compensatory damages, the constitutional requirement remains intact that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426; see also *Gore*, 517 U.S. at 580 (noting the "long pedigree" of the requirement that punitive damages bear a "reasonable relationship" to compensatory damages).

But in this case, the Sixth Circuit essentially abandoned its responsibility to ensure that there was a reasonable relationship between the two damage awards, once it had concluded that some higher ratio was permissible because of what it perceived to be particularly egregious conduct causing minimal actual damages. First, aside from cases involving nominal damages, the relatively small ratios in the cases that the Sixth Circuit cited to justify multiple-digit ratios actually underscore how grossly excessive a 2150-to-1 ratio is. See Pet. App. 26a (citing *Argentine* v. *United Steel Workers of Am., AFL-CIO, CLC*, 287 F.3d 476, 488 (CA6 2002) (42.5-to-1 ratio); and *Dean* v. *Olibas*, 129 F.3d 1001, 1007 (CA8 1997) (14-to-1 ratio)). Second, aside from cases involving police brutality, $600,000 vastly exceeds the amount of punitive damages imposed in all but one of the false arrest or malicious prosecution cases that the Sixth Circuit cited for

purposes of comparison, even though many of those cases involved conduct far more egregious than that present in this case. See Pet. App. 26a-31a (citing cases involving strip searches or criminal arrest and prosecution). Indeed, in the only case affirming an award as large as $600,000, a wealthy corporate defendant, Wal-Mart, had wrongfully caused a pregnant woman shopping on Christmas Eve with her children to be arrested, jailed, and tried for shoplifting; even on those facts, a $600,000 punitive award was the maximum permitted by due process. See *id.* 30a-31a (discussing *Wal-Mart Stores, Inc.* v. *Goodman*, 789 So. 2d 166, 171 (Ala. 2000)). Perhaps offended by what it perceived to be the "inexplicable and egregious" treatment of respondent and certainly insufficiently attentive to this Court's admonition that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," *Campbell*, 538 U.S. at 427-28, the Sixth Circuit ultimately failed to ensure that the punitive damages it imposed were reasonable and proportionate when it consciously chose an award that was "sixty per cent of the casino's daily intake at the time of the verdict," Pet. App. 33a.

Philip Morris USA v. *Williams*, No. 05-1256, will provide substantial guidance on the propriety of the punitive damages imposed below. On May 30, 2006, this Court granted the writ of certiorari in *Philip Morris*, limited to the first two questions presented in the petition. One of those questions is "[w]hether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can 'override' the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." Pet. (I). In *Philip Morris*, the Oregon Supreme Court affirmed a punitive damages award that was ninety-seven times the compensatory damages, *ibid.*, in light of conduct by the defendants perceived to be extraordinarily reprehensible, *see id.* at 5-6. This Court's resolution of whether the reprehensibility guidepost can "override" the ratio guidepost

will have obvious relevance to whether the Sixth Circuit was justified in allowing a 2150-to-1 ratio based largely on the perceived egregiousness of petitioners' conduct. More generally, in light of the fact that this Court has only two precedents interpreting *Gore*'s ratio guidepost, the analysis and discussion in *Philip Morris* will inevitably inform and improve the Sixth Circuit's analysis given that the court of appeals was previously forced to rely upon appellate jurisprudence that the petitioners in *Philip Morris* properly characterized as exhibiting an intolerable level of conflict and confusion. *See id.* at 14. For this reason, in the event that this Court decides that the state action issues in this case do not warrant granting review, the petition should at the least be held pending the decision in *Philip Morris* and then disposed of accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals,
Sixth Circuit.

Stella ROMANSKI, Plaintiff-Appellee,

v.

DETROIT ENTERTAINMENT, L.L.C., d/b/a/ MotorCity Casino, a Michigan Limited Liability Company; Marlene Brown, Defendants-Appellants,

Gloria Brown; Robert Edwards; and JoEtta Stevenson, Defendants.

No. 04-1354.

Argued: April 27, 2005.
Decided and Filed: Oct. 28, 2005.
Rehearing and Rehearing En Banc Denied Feb. 6, 2006.

Farris, Circuit Judge, dissented and filed opinion.

ARGUED: Megan K. Cavanagh, Garan Lucow Miller, P.C., Detroit, Michigan, for Appellants. Neil H. Fink, Law Offices of Neil H. Fink, Birmingham, Michigan, for Appellee. ON BRIEF: Megan K. Cavanagh, Rosalind Rochkind, Robert F. MacAlpine, Garan Lucow Miller, P.C., Detroit, Michigan, for Appellants. Neil H. Fink, Law Offices of Neil H. Fink, Birmingham, Michigan, Richard G. Lewandowski, S. David McNeill, Freeman McNeill, Birmingham, Michigan, for Appellee.

Before: KEITH, CLAY, and FARRIS, Circuit Judges.[1]

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[1] The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

CLAY, J., delivered the opinion of the court, in which KEITH, J., joined.

FARRIS, J. (pp. 650-52), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge.

A jury in the Eastern District of Michigan found Defendants Detroit Entertainment, L.L.C., which owns and operates the MotorCity Casino (we refer to both as "the casino"), and Marlene Brown, one of the casino's security personnel and a private security police officer with the power to arrest, liable under 42 U.S.C. § 1983 and under Michigan law for unlawfully arresting Stella Romanski. Defendants contend the judgment must be reversed and a new trial granted because the district court instructed the jury as a matter of law that Defendants acted under color of state law at all times relevant to this case. Defendants also raise other instruction-related claims. In the alternative, Defendants ask us to remit some of the $875,000 punitive damages award or order a new trial on the issue of damages.

We AFFIRM the judgment of the district court in all respects except that we VACATE the portion of the judgment comprised by the punitive damages award and REMAND for a remittitur of the punitive damages award, in accordance with the instructions of this opinion, or a new trial on the issue of punitive damages. The remarkable facts of this case make it indisputable that a substantial punitive damages award is warranted. Defendants' conduct was particularly egregious and a higher award to deter the casino from sanctioning such conduct in the future was appropriate. But an award of $600,000 will just as adequately serve the interests of punishment and deterrence and fits more comfortably in the ballpark of punitive awards that have been upheld in similar cases. We therefore order a remittitur to

that amount or, if Romanski so chooses, a new trial on damages.

I. BACKGROUND

On August 7, 2001, Romanski, then 72 years old, and her friends Dorothy Dombrowski and Linda Holman, went to Defendant Detroit Entertainment's MotorCity Casino in Detroit, Michigan, to gamble and enjoy lunch at the buffet. After a spate of unsuccessful tries at the slot machines, Romanski took a walk around the gaming floor. During her walk, Romanski noticed a five cent token lying in a slot machine's tray. Seeing no chair at the machine, she picked up the token and returned to the machine at which she had earlier played, intending to use the token there. Soon a uniformed male casino employee approached and asked that she accompany him to the office. She asked why but he did not answer. Romanski then noticed there were also three female casino employees, these not in uniform, surrounding her; she felt she could not move.

One of these plain-clothed security officers was Defendant Marlene Brown, who had been assigned to patrol the casino floor at that time. Brown testified that she approached Romanski, displayed her casino security badge, and began to explain it was the casino's policy not to permit patrons to pick up tokens, which appeared to be abandoned, found at other slot machines, a practice known as "slot-walking." Romanski could not have known this at the time because the casino does not post the so-called policy anywhere. It is undisputed, therefore, that Romanski did not have – and could not have had – notice of the casino's purported policy on slot-walking.

According to Brown, Romanski became loud and belligerent, so, at the advice of Brown's supervisor, JoEtta Stevenson (a defendant below), Brown escorted Romanski to an off-the-floor room where Brown intended to explain the policy in detail. For her part, Romanski testified that Brown

did not detain her because of her attitude but rather because Brown suspected her of theft.

It is undisputed that Brown and her colleagues escorted Romanski to what Defendants alternately call the "security office" and the "interview room." Whatever its name, the room is small and windowless, located off the casino's floor. According to Romanski, once they had taken their seats, Brown accused Romanski of stealing the token, whereupon Brown counted Romanski's money and removed one nickel from Romanski's winnings. Stevenson asked Romanski to turn over her social security card and driver's license; Romanski complied and these items were photocopied. Romanski was then photographed. Romanski testified that she acquiesced to these requests because Brown said she was a police officer, had a badge, and appeared to have handcuffs. Brown admitted having presented her badge and possessing handcuffs but testified that she identified herself only as a "security police officer," not as a bona fide police officer. There is no dispute that a uniformed casino security officer stood just outside the room for the duration of the questioning.

Romanski was ejected from the casino for a period of 6 months; Stevenson made the final decision to eject, or "86," Romanski. The precise ground for ejecting Romanski is unclear from the record. Although unknown to Romanski at the time, it is now undisputed that Brown and some of her colleagues on the casino's security staff were licensed under state law as "private security police officer[s]." Mich. Comp. Laws (M.C.L.) § 338.1079. By virtue of being so licensed, a private security police officer has "the authority to arrest a person without a warrant as set forth for public peace officers ... when that private security police officer is on the employer's premises." M.C.L. § 338.1080. The statute additionally requires that private security police officers make arrests only when they are on duty and in "the full uniform of the[ir]employer." *Id.* It is undisputed that Brown was on duty during the events of this case. It is also undisputed that

Brown was not wearing the uniform worn by some of the other security guards, but Defendants have never contended that this rendered Brown out of uniform for purposes of § 338.1080; indeed, Defendants have conceded from the beginning that the statute applies in this case. Their argument is simply that the power admittedly conferred on Brown by the statute did not make her actions under color of state law. *See* 42 U.S.C. § 1983.

Brown was in charge of escorting Romanski to the valet parking area of the casino, where Romanski was to wait for her 3 p.m. bus home. Brown and her colleagues denied Romanski's request to meet her friends for lunch at the buffet – indeed, they did not permit Romanski to eat lunch at all. In addition, they did not permit Romanski to enter the restroom by herself; Brown accompanied Romanski into the restroom and waited outside the stall. At 3 p.m., Romanski exited the valet area to board what she thought was her bus; it turned out not to be but instead of returning to the valet area she ran into her friends and stayed outside. It was extremely hot and humid and Dombrowski and Holman persuaded Romanski to return to the casino. Upon entering, the three were confronted by casino employees, who directed them to return to the valet area, which is air-conditioned; they waited there until the bus arrived.

It is undisputed that Brown prepared an incident report following Romanski's ejection in which Brown referred to Romanski as a "suspect." Romanski introduced the casino's security manual into evidence; it instructs security employees to refer to patrons as "suspects" only if the employee arrested the patron and otherwise to refer to the patron as a "subject." Stevenson confirmed that this policy was in effect when Romanski was ejected. Finally, it is undisputed that as a matter of course, the casino notifies the Michigan State Police when it ejects someone; the casino notified the Michigan State Police of Romanski's ejection.

As these facts reflect, Defendants' treatment of Romanski was inexplicable and egregious. The district court aptly expressed the egregiousness of Defendants' conduct in its opinion denying Defendants' motion for summary judgment: "There is sufficient evidence to allow a jury to find that after [Romanski] picked up an abandoned token that Defendants – by using the authority vested in them by the State of Michigan – surrounded her, arrested her, led her to the security office, prevented her from leaving the security office, and stole the five cents that she found from her. Afterwards, they surrounded her as they threw her out of the casino, and refused to let her use the restroom by herself. Defendants also prevented her from having lunch with her friends [and] falsely told her friends that she had stolen from them .... [A] jury could certainly exclaim 'Outrageous.'" *Romanski v. Detroit Entertainment, L.L.C.*, 265 F.Supp.2d 835, 848-49 (E.D.Mich.2003) (citations omitted). Indeed, a jury *did* make such an exclamation: it found in Romanski's favor and made a substantial punitive damages award.

In November 2001, Romanski sued Defendants MotorCity Casino and two un-named employees of the casino in the Circuit Court of Wayne County, Michigan, alleging false arrest, false imprisonment, defamation, and intentional infliction of emotional distress. In an amended complaint, Romanski named as defendants Detroit Entertainment, L.L.C., d/b/a MotorCity Casino, Marlene Brown, Gloria Brown, Robert Edwards, and Joetta Stevenson, the individual defendants being the employees involved in Romanski's detention, questioning, and ejection from the casino. The amended complaint also included a new cause of action, namely, a claim under 42 U.S.C. § 1983 that Defendants had violated Romanski's Fourth Amendment rights. Specifically, Romanski alleged that Defendants, acting under color of state law, had arrested her without probable cause because the token she picked up was abandoned, i.e., not the casino's property.

Defendants removed the action to federal district court in the Eastern District of Michigan. The district court issued an order to show cause "as to whether Defendants' conduct was 'under color of law' for purposes of 42 U.S.C. § 1983" and considered the parties' briefs on the issue. The court concluded that Brown was acting under color of state law because she possessed the same authority to make arrests that the police enjoy. Having determined that there was a proper basis for federal jurisdiction, the district court exercised its supplemental jurisdiction over Romanski's state law claims.

The parties conducted discovery from September 2002 through February 2003. On March 6, 2003, Defendants moved for summary judgment on all claims. On the § 1983 claim, Defendants argued that they were not acting under color of state law in this case and in any event had probable cause to detain Romanski. In a published decision, the district court denied Defendants' motion for summary judgment. 265 F.Supp.2d 835 (E.D.Mich.2003). The court held as a matter of law that Defendants had acted under color of state law during the events of this case because Brown, the defendant who initiated Romanski's detention, did so while on duty in her capacity as a licensed private security police officer empowered with the same arrest authority as a public police officer. *Id.* at 841-43. The court further held that genuine factual disputes precluded summary judgment on the Fourth Amendment claim and Romanski's state law claims. *Id.* at 844-49.

The trial began on July 15, 2003. At the close of Romanski's case-in-chief, Defendants moved for judgment as a matter of law on all claims and asked the district court to reconsider its conclusion on the state action[1] question. The

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[1] Throughout this opinion we use the terms "state actor" or "state action" and "acting under color of state law" interchangeably. As the Supreme Court has held: "[i]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes."

district court declined to rule on the motion, reserving it for a later ruling. At the charge conference and during the parties' exchange of proposed jury instructions, Defendants again raised the state action question, arguing that the jury should be instructed to find as a matter of fact whether Defendants were acting under color of state law. The district court disagreed and instructed the jury as follows: "Acting under color of law in this case simply means acting in one's capacity as a licensed security officer with powers to make an arrest on the casino premises. I instruct you as a matter of law that the defendants were acting under color of law at the time of this incident and you may find that this element has been established." The other issues in the case were submitted to the jury, which found the casino and Brown liable on the Fourth Amendment wrongful arrest claim and the casino alone liable on the state law false arrest and false imprisonment claims. The jury did not find any of the defendants liable for defamation or intentional infliction of emotional distress but, based on its verdict on Romanski's other claims, the jury awarded $279.05 in compensatory damages. Based exclusively on the verdict in favor of Romanski on her § 1983 claim, the jury awarded $500 in punitive damages against Brown, and $875,000 in punitive damages against the casino.

Defendants moved for a judgment not withstanding the verdict or, in the alternative, for a new trial. *See* Fed.R.Civ.P. 50, 59. The district court denied the motion, resting largely on the reasoning expressed in its summary judgment ruling. The casino and Brown (the only defendants found liable by the jury) brought this timely appeal. They argue that: (1) it was improper for the district court to hold they were state actors as a matter of law and accordingly seek either a new

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Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 n. 2, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)).

trial or judgment in their favor on the § 1983 claim; (2) in connection with Romanksi's claim that Defendants lacked probable cause to arrest her, the district court gave an erroneous jury instruction on the issue of whether the token was abandoned; (3) apparently in connection only with Defendants' own desire for a jury instruction on a purported common law right of private businesses to detain patrons suspected of theft, the district court erroneously declined to accept Defendants' proposed instruction; and (4) the $875,000 punitive damages award, imposed exclusively on the basis of the jury's finding of liability under 42 U.S.C. § 1983, is so excessive that it does not comport with due process. We consider each claim in turn.

II. DISCUSSION

A. State Action

Section 1983 makes liable only those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law. 42 U.S.C. § 1983; *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *Chapman v. Higbee Co.,* 319 F.3d 825, 833 (6th Cir.2003) (*en banc*); *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir.1992). A private actor acts under color of state law when its conduct is "fairly attributable to the state." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 947, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). "The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test." *Chapman,* 319 F.3d at 833 (citing *Wolotsky,* 960 F.2d at 1335). *See West v. Atkins,* 487 U.S. 42, 49-50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (public function); *Flagg Bros.,* 436 U.S. at 157, 98 S.Ct. 1729 (same); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 170, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (state compulsion test); *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 721-26, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) (symbiotic relationship or nexus test).

The district court concluded that Brown and any of her colleagues similarly licensed as private security police officers pursuant to M.C.L. § 338.1079 were state actors under the public function test. 265 F.Supp.2d at 841-43. Consistent with this holding, the district court took the state action issue out of the case, granting in effect judgment as a matter of law to Romanski on that issue. Consequently, we review the state action aspect of the district court's decision *de novo* and view all facts in the light most favorable to Defendants. *United States v. Alpine Indus., Inc.*, 352 F.3d 1017, 1022 (6th Cir.2003); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 258 (6th Cir.2000).

Under the public function test, a private entity is said to be performing a public function if it is exercising powers traditionally reserved to the state, such as holding elections, taking private property under the eminent domain power, or operating a company-owned town. *See Flagg Bros.*, 436 U.S. at 157-58, 98 S.Ct. 1729 (holding elections); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (exercising eminent domain); *Marsh v. Alabama*, 326 U.S. 501, 505- 509, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (operating a company-owned town). The Supreme Court has expressly left open the question whether and under what circumstances private police officers may be said to perform a public function for purposes of § 1983. *Flagg Bros.*, 436 U.S. at 163, 98 S.Ct. 1729. Nevertheless, as the district court observed, there is a growing body of case law to consult for guidance on this question.

For example, in a decision deemed by both parties and the district court to bear directly on the issue presented in this case, the Seventh Circuit held that private police officers licensed to make arrests could be state actors under the public function test. *Payton v. Rush-Presbyterian*, 184 F.3d 623, 627-30 (7th Cir.1999). To be sure, *Payton* was an appeal of a dismissal pursuant to Fed.R.Civ.P. 12(b)(6), but we think this distinction is of little relevance since the crucial fact in that case – assumed to be true there but indisputable here – was

that by virtue of their status as on-duty special police officers, licensed by the city of Chicago, the defendants enjoyed "virtually the same power as public police officers." *Id.* at 629. Indeed, the defendants in *Payton* operated under an ordinance which provided that special police officers licensed under it "shall possess the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged." *Id.* at 625 (quoting Chicago City Code § 4-340-100 (1993)).

This broad delegation of power, the Seventh Circuit reasoned, distinguished *Payton* from an earlier case in which the court had held that a private security guard endowed with more limited police-type powers was not a state actor. *See Wade v. Byles,* 83 F.3d 902, 905-906 (7th Cir.1996). The defendant in *Wade* was permitted to carry a handgun and to use deadly force in self-defense but could arrest someone only for "trespass pending the arrival of the police" and could exercise these powers only in the lobbies of properties owned by the public housing authority for which he worked. *Id.* at 906. The defendant was not a state actor because, as the court put it in *Payton,* "none of these powers had been exclusively reserved to the police – citizen's arrests and the rights to carry handguns and use them in self-defense are available to individuals outside of the law enforcement community." *Payton,* 184 F.3d at 629 (citing *Wade,* 83 F.3d at 906).

Payton illustrates a line that has been drawn in the case law. The line divides cases in which a private actor exercises a power traditionally reserved to the state, but not exclusively reserved to it, e.g., the common law shopkeeper's privilege, from cases in which a private actor exercises a power exclusively reserved to the state, e.g., the police power. Where private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test. *See Payton,* 184 F.3d at 630; *Henderson v. Fisher,* 631 F.2d 1115 (3d Cir.1980) (*per curiam*) (university policemen with plenary police authority throughout the

university's campus); *Rojas v. Alexander's Dept. Store, Inc.*, 654 F.Supp. 856 (E.D.N.Y.1986) (New York City special patrolman with plenary police authority patrolling a department store). The rationale of these cases is that when the state delegates a power traditionally reserved to it alone -- the police power – to private actors in order that they may provide police services to institutions that need it, a "plaintiff's ability to claim relief under § 1983 [for abuses of that power] should be unaffected." *Payton*, 184 F.3d at 629; *cf. Henderson*, 631 F.2d at 1118.

On the other side of the line illustrated by *Payton* are cases in which the private defendants have some police-like powers but not plenary police authority. *See Wade*, 83 F.3d at 906-907; *Johnson v. LaRabida Children's Hospital*, 372 F.3d 894, 896-97 (7th Cir.2004) (hospital security guards who had authority to patrol and eject people but not to carry guns and who had to call the police if someone became hostile and belligerent). A subset of these cases are cases in which a private institution's security employees have been dispatched to protect the institution's interests or enforce its policies. The canonical example here is when a store avails itself of the common law shopkeeper's privilege, the privilege at issue in this Court's *en banc* decision in *Chapman v. Higbee Co.*, and the Fifth Circuit case upon which *Chapman* relied. *See Chapman*, 319 F.3d at 833-34 (discussing *White v. Scrivner Corp.*, 594 F.2d 140, 142 (5th Cir.1979)).

Like the district court, we think this case falls on the *Payton* side of the line. It is undisputed that Brown (and some of her colleagues) were private security police officers licensed under M.C.L. § 338.1079. This means that Brown's qualifications for being so licensed were vetted by Michigan's department of state police, *id.* § (1), and that Brown was subject to certain statutes administered by that department. *Id.* § (2); *see* M.C.L. §§ 338.1067, 338.1069. More critical for present purposes are the undisputed facts that Brown was on duty and on the casino's premises at all times relevant to this case. These undisputed facts lead to an inescapable

conclusion of law – namely, that at all times relevant to this case, Brown "ha[d] the authority to arrest a person without a warrant as set forth for public peace officers ...." M.C.L. § 338.1080. One consequence of Brown's possession of this authority, the authority to make arrests at one's discretion and for any offenses, is clear: at all times relevant to this case, Brown was a state actor as a matter of law.[2]

Unlike the common law privileges at issue in *Wade* (the use of deadly force in self-defense, the right to detain for trespass, and the right to carry a weapon) and *Chapman* (the

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[2] The dissent's repeated reliance on *City of Grand Rapids v. Impens*, 414 Mich. 667, 327 N.W.2d 278 (1982), is misplaced. There, private security officers suspected the defendant and two others of shoplifting. *Id.* at 279. The officers *asked* the three individuals to come to the security office. *Id.* The officers searched the three and found merchandise on one of the other individuals. *Id.* The officers then elicited information from the defendant to complete a "Loss Prevention Department Voluntary Statement." *Id.* The officers read the statement to the defendant and asked the defendant to sign it, which he did. *Id.* "There was no indication that defendant would not be released if the statement were not signed." *Id.* Prior to his trial, the defendant moved to suppress the signed statement, arguing that it was obtained in violation of *Miranda*. *Id.* The Michigan Court held that the private security officers were not required to give *Miranda* warnings. *Id.* at 282.

One obvious distinction between the instant case and *Impens* is that *Impens* did not involve an arrest in any form. There, the defendant was not held against his will. He was asked to go to the security office; he was asked to sign a form. There was no indication of arrest.

The key distinction, however, is that the security officers did not exercise power exclusively reserved to the states. The contested conduct was the security officers' elicitation of the defendant's statements. Simply put, asking questions in a non-custodial setting is a power not within the exclusive province of the state.

shopkeeper's privilege), which may be invoked by any citizen under appropriate circumstances, the plenary arrest power enjoyed by private security police officers licensed pursuant to M.C.L. § 338.1079 is a power traditionally reserved to the state alone.[3] *See Payton,* 184 F.3d at 630; *Henderson,* 631 F.2d at 1118; *Rojas,* 654 F.Supp. at 858; *Thompson v. McCoy,* 425 F.Supp. 407, 409-10 (D.S.C.1976). *See also United States v. Hoffman,* 498 F.2d 879, 881 (7th Cir.1974) (holding that private railroad police possessing the same powers as public police officers were state actors). *Cf. Screws v. United States,* 325 U.S. 91, 109- 10, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (observing that one has the power to arrest only when one is "clothed with the authority of state law") (citation omitted); *Rodriguez v. Smithfield Packing*

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[3] The dissent misinterprets this Court's language with respect to the phrase "plenary arrest power." We agree with the dissent that under Michigan law, a licensed private security officer has a power of arrest equivalent to that held by a public police officer only on the property of her employer and only during her work hours. The Court has never contended that M.C.L. § 338.1080 gives a private security officer the power to make warrantless arrests wherever and whenever she pleases.

Instead, a licensed private security officer's arrest power is plenary in the sense that while on her employer's property during her working hours, a private security officer can make warrantless arrests to the same extent as a public police officer. The instant case closely resembles *Henderson,* a case where the court found state action when the state delegated to university police officers a full power of arrest limited to campus property. 631 F.2d at 1118 (citing 71 PA. STAT. ANN. § 646).

In contrast, the private security officers in *Wade* only had the power to "arrest people for criminal trespass ...." 83 F.3d at 906. As the Seventh Circuit later pointed out, the private security officers in *Wade* would have to "dial 911" if they witnessed a crime other than criminal trespass. *Payton,* 184 F.3d at 630. Under Michigan law, a private security officer has no such limitation.

Co., Inc., 338 F.3d 348, 355 (4th Cir.2003) (observing that "the police function is 'one of the most basic functions of government' " and "an arrest is 'the function most commonly associated with the police' ") (quoting *Foley v. Connelie*, 435 U.S. 291, 297, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978)).

Defendants contend that *Wade* ought to control here because, as in that case, private security police officers' power to make arrests is subject to spatial or geographic limits. *See* M.C.L § 338.1080. But the spatial or geographic limitation in *Wade* was profound – it prohibited housing authority security guards from exercising their (already minimal) powers anywhere except in the lobbies of buildings operated by the housing authority. *See Wade*, 83 F.3d at 906. By contrast, § 338.1080 invests private security police officers with full arrest authority on the entirety of their employer's premises, which makes this case distinguishable from *Wade* and similar to *Payton* and *Henderson*, each of which involved a statute or ordinance that imposed or contemplated some spatial or geographic limits on the private defendants' police powers. *See Payton*, 184 F.3d at 625 (special police officers "shall possess the powers of the regular police patrol *at the places for which they are respectively appointed* ") (emphasis added) (citation omitted); *Henderson*, 631 F.2d at 1117-19 (authority of the university police was limited to the university campus in question). Furthermore, as we have discussed, private security police officers in Michigan are endowed with plenary arrest authority, *see* § 338.1080, while the defendant in *Wade* was permitted to exercise only what were in effect citizens' arrests. *Wade*, 83 F.3d at 906; *see also Payton*, 184 F.3d at 629-30.

Finally, we address Defendants' repeated representation that, although empowered to make arrests under § 338.1080, Brown and the other casino employees licensed under the statute are, as a matter of casino policy, not permitted to exercise this statutory authority to effectuate arrests. For this argument Defendants again rely on *Wade*, in which the very

document that was the source of the defendant's police-type powers, his contract with the public housing authority, at the same time imposed profound limits on those powers. *See Wade*, 83 F.3d at 905-906. Here the source of Brown's power to make arrests is a statute that includes no qualitative limits on that power, so *Wade* is inapplicable. Defendants do not cite a case in which a private security officer licensed to make arrests as under § 338.1080 was held not to be a state actor on the ground that the officer's employer substantially circumscribed the arrest power conferred on the officer by having been licensed. The only arguable support we have found for Defendants' argument is the concurring opinion in *Payton*, in which Judge Ripple opined that while for pleading purposes the plaintiff's claim of state action was viable, it might ultimately fail because "[f]urther development of the record might well establish ... that the guards' responsibilities were significantly circumscribed by their employer and that they performed well-defined functions quite narrow in scope ...." 184 F.3d at 634 (Ripple, J., concurring).

In this case, whatever development of the record occurred did not reveal circumscriptions of Brown's authority, let alone circumscriptions of the sort contemplated by Judge Ripple in *Payton*. Indeed, it is noteworthy that Defendants did not even make this argument at the summary judgment stage of the proceedings, arguing instead that while Brown and some of her colleagues *do* have the power to make arrests, Brown did not use it in this case. It is not surprising then, that in their brief to this Court, Defendants do not offer a single citation to the record in support of the contention that Brown's arrest authority was substantially circumscribed. Furthermore, the jury found that Defendants had in fact arrested Romanski and this aspect of the judgment is not on appeal (Defendants' jury instruction claim goes to whether probable cause existed, not whether an arrest occurred). Under these circumstances, we decline Defendants' invitation to look past § 338.1080's express grant of plenary arrest authority to private security police officers. We similarly find

unpersuasive the representation made on appeal that Brown was not acting pursuant to her § 338.1080 authority when she initiated the unlawful arrest of Romanski, but rather was merely protecting the casino's self-interest – conduct, Defendants maintain, that was more in the nature exercising the shopkeeper's privilege. *See, e.g., Chapman,* 319 F.3d at 833-34. Quite apart from the question whether Michigan's version of the shopkeeper's privilege even applies to casinos (see M.C.L. § 600.2917 and our discussion in the next section) there is no evidence in the record that could support the self-protection narrative Defendants urge us to adopt. Indeed, all of the evidence was to the contrary: Brown was employed by the casino as a private security police officer and was on duty in that capacity when she initiated the detention of Romanski.

Consistent with the Seventh Circuit's approach in *Wade* and *Payton,* we have focused on the specific powers that Brown, in her capacity as an on-duty and duly licensed private security police officer, had at her disposal. *See Payton,* 184 F.3d at 629-30; *Wade,* 83 F.3d at 905-906. Because at least one of these powers, the plenary arrest power, is "traditionally the exclusive prerogative of the state," *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 353, 95 S.Ct. 449, and because it is undisputed that Brown was in fact duly licensed under M.C.L. § 338.1079 and was in fact on duty at all times relevant to this case, the district court correctly held that Brown was a state actor as a matter of law.[4]

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[4] We are aware that in contrast to the district court's conclusion below and our holding in this opinion, two other district courts in the Eastern District of Michigan have concluded in similar cases that private security police officers employed by the casino were not acting under color of state law. *Smith v. Detroit Entertainment L.L.C.,* 338 F.Supp.2d 775 (E.D.Mich.2004); *Lindsey, et al. v. Detroit Entertainment L.L.C.,* Slip. Op., No. 03-CV-71129 (E.D.Mich. Oct. 14, 2004) (unpublished). Both cases have been appealed to this Court and briefing was held in abeyance pending our decision in this case. We have reviewed the respective district courts' analysis of the state action question in those

B. Jury Instructions

Defendants also contend that two of the district court's jury instructions were erroneous. We must "review jury instructions as a whole to determine if they adequately inform the jury of the relevant considerations and 'provide a basis in law for aiding the jury in reaching its decision.' " *Argentine v. United Steelworkers of America, AFL-CIO*, 287 F.3d 476, 484 (6th Cir.2002) (quoting *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 592 (6th Cir.1986)). Accordingly, we will reverse a jury verdict on account of instructional error "only in situations where the instruction, viewed as a whole is 'confusing, misleading, and prejudicial.' " *Id.* (quoting *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 822 (6th Cir.2000)). Applying these standards, we find no error with respect to the two instructions at issue in this appeal.

The first instruction to which Defendants object related to whether they had probable cause to arrest Romanski. Defendants apparently argued that they had probable cause to believe Romanski had stolen the five cent token from the casino, i.e., that the token was not abandoned when Romanski took it into her possession. Although the district court did conclude at the summary judgment stage that there was a bona fide jury question as to whether the token was abandoned, it nevertheless observed "that there is no other likely explanation for the token being in the tray of the slot machine." 265 F.Supp.2d at 845. The district court's statement is an apt reflection of the record, which contains not even a scintilla of evidence supporting Defendants' contention that the token was the casino's property rather than abandoned by a prior player at the slot machine. Nor did Defendants come forward with a basis in Michigan law for their assertion that the token became the casino's property once the prior player departed. The general rule, as noted by

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cases and, for the reasons stated in this opinion, do not find either opinion persuasive on that point.

the district court, is that playing a slot machine is the commencement of an aleatory contract between the player and the casino. In the event the player wins a round, the casino "loses its legal right to the property, and the [player] gains that right." 265 F.Supp.2d at 845 (citing Restatement (Second), Contracts § 232 cmt. c (1981)).

Against this backdrop, we cannot say the district court erred when it instructed the jury that:

> This case, as we all know, involves a token, a five cent token. The plaintiff as the finder of a lost or abandoned token, has superior title to that token than does the Motor City Casino. In determining whether the token was lost or abandoned, you are to use your common sense and consider whether there was any other rational circumstance for that token to be in that tray. The only person who has a superior right to that token other than the plaintiff, is the person who lost it or the person who abandoned it.

We must also note the patent insignificance of a five cent token. Assuming for the moment that Defendants genuinely suspected Romanski of theft (it appears from the record that the real motive for the poor treatment of Romanski may have been her "attitude"), Defendants' decision to deal with the situation by dispatching a team of security personnel – at least one of whom was in effect a police officer – to detain and interrogate Romanski offends the "venerable maxim *de minimis non curat lex* ('the law cares not for trifles')." *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992) (citing cases). Under the circumstances of this case, the district court's instruction on abandonment was not confusing, misleading, or prejudicial. *See Argentine*, 287 F.3d at 484.

Defendants' second jury instruction claim relates to two instructions it proposed but the district court rejected.

Defendants first requested the district court to instruct the jury that "[a] private business owner has the right to protect its business interests and property and may detain a patron suspected of theft." The district court declined to adopt this proposed instruction on the ground that the authority cited by Defendants in support of it related only to the common law shopkeeper's privilege to detain a patron suspected of theft – a privilege, the district court reasoned, that Michigan law does not extend to casinos.

This proposed instruction was not material to an issue in the case. The jury was instructed that Romanski's false arrest claim depended on proof that some legal justification (usually probable cause) for the detention was lacking, *see Lewis v. Farmer Jack Div., Inc.*, 415 Mich. 212, 327 N.W.2d 893, 894 (1982); and, similarly, that her § 1983 claim depended on proof that probable cause was lacking. The shopkeeper's right to detain suspected thieves, assuming for the moment that it applies to casinos, is a cognizable defense only where there is probable cause that a theft occurred. M.C.L. § 600.2917(1) (the codification of Michigan's shopkeeper privilege). Were it otherwise, shopkeepers who invoked the privilege would be insulated from liability for false arrest. In short, contrary to Defendants' requested instruction, neither shopkeepers nor casino proprietors enjoy an absolute privilege to detain patrons. It is clear, therefore, that the district court's instructions on probable cause and false arrest properly explained the crux of any self-protection privilege the casino might enjoy. To the extent that Defendants proposed the right-to-detain instruction in connection with the state action question, we have already held that in this case the casino employed Brown in her capacity as an on-duty private security police officer, not as a security guard charged merely with protecting the casino's property.

The second instruction sought by Defendants – an instruction to the effect that Michigan permits a casino to eject a patron for any reason it deems necessary – was likewise immaterial to the issues in the case; we have no

trouble, therefore, concluding that the district court properly rejected it. The gravamen of Romanski's claim for relief is not that she was ejected but rather that she was arrested without probable cause, which is why she sued for false arrest and unlawful arrest, the latter under § 1983. Accordingly, Romanski's claim for relief goes principally to Defendants' treatment of her before she was ejected from the casino; and, it must be remembered, it is that conduct alone for which the jury held Defendants liable. We see no error in the district court's decision to reject this proposed instruction.

C. Amount of the Punitive Damages Award

The casino appeals the jury's assessment of $875,000 in punitive damages against it on the ground that the amount is unconstitutionally excessive. Whether a punitive damages award is so excessive as to offend due process depends on our assessment of the three "guideposts" first enunciated in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996): the degree of reprehensibility of the defendant's conduct, the punitive award's ratio to the compensatory award, and sanctions for comparable misconduct. *Id.* at 576-84, 116 S.Ct. 1589. We conduct "*de novo* review of a trial court's application of [these guideposts] to the jury's award." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001)). As the Supreme Court recently said: "Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *Id.* (internal quotation marks and citation omitted); *see Gore,* 517 U.S. at 587, 116 S.Ct. 1589.

1. Reprehensibility

The Supreme Court has said that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell,* 538 U.S. at 419, 123 S.Ct. 1513 (quoting *Gore,*

517 U.S. at 576, 116 S.Ct. 1589). We must "determine the reprehensibility of a defendant" by considering whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. (citing *Gore,* 517 U.S. at 576-77, 116 S.Ct. 1589). Merely because one of these factors is satisfied in a given case does not mean the punitive damages award is constitutionally unassailable; however, "the absence of all of them renders any award suspect." *Id.* In conducting our review of the punitive damages award, we must presume that a plaintiff's compensatory award made her whole for her injuries. *Id.* Consistent with the well-established purpose of punitive damages, *see Gore,* 517 U.S. at 568, 116 S.Ct. 1589 (citing cases), such damages "should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Campbell,* 538 U.S. at 419, 123 S.Ct. 1513.

In conducting its reprehensibility analysis, the district court concluded that the harm caused by the casino "was primarily physical, rather than economic." The basis for this conclusion was the fact that Romanski "testified that she felt sick, embarrassed, humiliated, intimidated and scared." Romanski's economic losses totaled $9.05, the combined value of the lunch ticket revoked by the casino ($9) and the five-cent token the casino seized. The remaining $270 of the compensatory award was to make Romanski whole for the emotional distress she suffered as a result of Defendants' conduct. We think the district court was generally correct to describe Romanski's harm as primarily physical in character.

Although she did not suffer actual physical injury, the jury could reasonably infer from the peculiar circumstances of Romanski's detention and questioning -- a process initiated on the casino floor in front of patrons by a team of four security personnel – that the threat of physical force was apparent. Indeed, there was testimony that Brown threatened Romanski and it is undisputed that Brown had handcuffs at her disposal; in addition, it appears undisputed, so far as we can discern, that Brown and perhaps another member of the security staff accused Romanski of theft. In sum, we agree with the Second Circuit's conclusion in a similar case that a defendant's conduct can be highly reprehensible without being actually violent. *See Lee v. Edwards,* 101 F.3d 805, 810 (2d Cir.1996) (although the defendant police officer did not use force in maliciously prosecuting the plaintiff, the defendant's invocation of state power to deprive the plaintiff of his rights presented "an element of real and threatened force that could have aroused the jury").

More important than the harm Romanski suffered, that harm being of such a type that the label "physical" rather than "economic" befits it, is the fundamental nature of Defendants' conduct in this case. As we indicated at the outset, Defendants treated Romanski in an inexplicable and egregious way. Indeed, on this record a jury could reasonably infer that Brown acted with "intentional malice" and not "mere accident." *Campbell,* 538 U.S. at 419, 123 S.Ct. 1513. This is not a case of mistaken identity, nor one in which a law enforcement officer reasonably misread the circumstances. Defendants admit that Romanski was targeted because she picked up a five cent token. Whether Brown subsequently detained Romanski on suspicion of theft or because Romanski's "attitude" perturbed Brown, the crucial point for reprehensibility purposes is that the detention itself and the manner in which it was carried out – e.g., by a team of four security personnel surrounding Romanski – were so egregious in light of the circumstances that malice naturally comes to mind. What other motivation, a reasonable observer might

ask, would cause Brown and her colleagues to detain and interrogate a 72-year-old woman in a windowless room over five cents? This is especially true in light of the jury's conclusion that Defendants lacked probable cause to arrest Romanski. *See Stamathis v. Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir.2004) ("[A]s to the reprehensibility of the act, we cannot ignore that the jury found that the defendants did not have probable cause."); *Williams v. Kaufman County*, 352 F.3d 994, 1015 (5th Cir.2003) (observing that a strip search obviously conducted without probable cause evidenced "reckless indifference toward the constitutional rights of plaintiffs" and hence was strong evidence of reprehensibility). The fact that the Defendants *knew* that the casino's own patrons had not been provided with notice of the slot-walking prohibition only makes the Defendants' conduct more reprehensible.

But Defendants' remarkable abuse of power did not end there. It is undisputed that the casino revoked Romanski's lunch ticket and, having been ejected, she was not permitted to eat anywhere in the casino. In other words, the rather inhospitable outside (it was humid and over 90 degrees) was the 72- year-old Romanski's only choice for lunch. It is further undisputed that Defendants refused to allow Romanski to enter the restroom by herself; instead, Defendants callously forced her to endure the indignity of having Brown stand guard outside the stall. This is without question evidence of malice and of a conscious disregard for Romanski's well-being and hence is probative of reprehensibility. *Cf. Gore*, 517 U.S. at 575, 116 S.Ct. 1589; *Campbell*, 538 U.S. at 419, 123 S.Ct. 1513. Finally, we must note one facet of the casino's behavior that is particularly deserving of condemnation and further indicative of malice, namely, that it dispatched someone who was in effect a police officer, with all the authority that that implies. Apparently, the casino was not content to have an ordinary security guard – one without the power to make arrests – simply inform Romanski of the purported slot-walking policy and leave it at that. There is,

consequently, a troubling element of gratuitousness in Defendants' conduct.

In closing our discussion of reprehensibility, we find it appropriate to quote the district court again, this time from its opinion denying Defendants' motion for a new trial or a remittitur: "[T]his case was not about the loss of a five-cent token or a nine-dollar meal ticket; it was about [Romanski's] right not to be unreasonably seized [and] unreasonably detained .... Defendants acted with at least indifference to the health or safety of [Romanski], an elderly woman. After Defendant Brown observed [Romanski] play the five-cent token, [Romanski] was surrounded by four security guards, led up to the security office, informed she had committed a crime, photographed, and reported to the state police .... [T]he Court finds the conduct of Defendant MotorCity's employees to be particularly reprehensible."

In sum, while there is no evidence of similar misconduct in the past on the casino's part, *see Gore,* 517 U.S. at 576-77, 116 S.Ct. 1589; *Campbell,* 538 U.S. at 422-23, 123 S.Ct. 1513, it is clear in this case that the reprehensibility guidepost weighs in favor of a substantial punitive damages award.

2. Ratio

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Gore,* 517 U.S. at 580, 116 S.Ct. 1589 (citations omitted). When considered against the broad spectrum of civil cases, the ratio in this case (3,135 to 1) is unusually high and the compensatory damages award is unusually low. *Compare Gore,* 517 U.S. at 580-81, 116 S.Ct. 1589 (rejecting a 500-to-1 ratio where the compensatory award was $4000); *Campbell,* 538 U.S. at 425-26, 123 S.Ct. 1513 (rejecting a 145-to-1 ratio where the compensatory award was $1 million). But this is a § 1983 case in which the basis for the punitive damages award was the plaintiff's unlawful arrest and the plaintiff's economic injury was so minimal as to be

essentially nominal. The Supreme Court's cases on the ratio component of the excessiveness inquiry – which involved substantial compensatory damages awards for economic and measurable noneconomic harm[5] – are therefore of limited relevance. *See Lee,* 101 F.3d at 810-12.

This Court and other courts have recognized that where "injuries are without a ready monetary value," such as invasions of constitutional rights unaccompanied by physical injury or other compensable harm, higher ratios between the compensatory or nominal award and the punitive award are to be expected. *Argentine v. United Steel Workers of Am., AFL-CIO, CLC,* 287 F.3d 476, 488 (6th Cir.2002) (sustaining a 42.5 to 1 ratio, and thus a $400,000 punitive award, where injury was a national union's sustained campaign of retaliation against a local branch because some of its members expressed disagreement with a union-promoted bargaining agreement); *see also Dean v. Olibas,* 129 F.3d 1001, 1007 (8th Cir.1997) (sustaining a 14 to 1 ratio, and thus a $70,000 punitive award, where the unlawful arrest of the plaintiff caused him primarily a kind of harm not measurable in monetary terms). Indeed, the Second Circuit has reasoned, we think correctly, that in cases where the compensatory award is very low or nominal, "*any* appreciable exemplary award would produce a ratio that would appear excessive by this measure." *Lee,* 101 F.3d at 811; *see also Fabri v. United Technologies Intern., Inc.,* 387 F.3d 109, 126 (2d Cir.2004); *DiSorbo v. Hoy,* 343 F.3d 172, 187 (2d Cir.2003). The Fifth Circuit also adheres to this uncontroversial view. *See Williams,* 352 F.3d at 1016.

These decisions in the circuits are based as much on intuition as on the only plausible interpretation of crucial

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[5] *See Gore,* 517 U.S. at 565, 116 S.Ct. 1589 (a $4000 compensatory damages award for depreciation to a car's value due to an undisclosed re-painting performed by the manufacturer); *Campbell,* 538 U.S. at 415, 123 S.Ct. 1513 (a $1 million compensatory damages award for economic harm and emotional distress).

dicta in *Gore* and *Campbell;* to wit, as the Court said in the first of those cases: "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore,* 517 U.S. at 582, 116 S.Ct. 1589. Read in conjunction with the Court's consistent "rejection of a categorical approach" to evaluating the constitutionality of punitive damages awards, *id.; Campbell,* 538 U.S. at 425, 123 S.Ct. 1513, these pronouncements about the effect, in appropriate cases, of a low or nominal compensatory award on the excessiveness inquiry are weighty indeed. *See, e.g., Argentine,* 287 F.3d at 488; *Lee,* 101 F.3d at 811.

Consistent with these principles, we think that to determine whether the punitive award in this case is within constitutional limits, the best approach is to compare it to punitive awards examined by courts "in other civil rights cases to find limits and proportions." *Lee,* 101 F.3d at 811; *see also DiSorbo,* 343 F.3d at 189; *Williams,* 352 F.3d at 1016 n. 78. This approach is necessarily unscientific but aids us in identifying a ballpark within which to evaluate the $875,000 award at issue here.

We know of only one prior case in which we considered the constitutionality of a punitive damages award assessed pursuant to a finding of liability under § 1983. The case, *Gregory v. Shelby County,* is quite distinguishable, however, because the plaintiff "suffered severe physical abuse, endured long hours of conscious pain and suffering, and ultimately died as a result [of a police officer's] actions." 220 F.3d 433, 445 (6th Cir.2000). Furthermore, the compensatory award in *Gregory* was $778,000, so the $2.2 million punitive award easily satisfied *Gore*'s ratio guidepost. *Id.* We turn, then, to other courts' treatment of punitive awards in civil rights cases.

In *Lee v. Edwards*, the plaintiff was awarded nominal compensatory damages and the Second Circuit concluded that the malicious prosecution verdict against the defendant, a police officer, would support a punitive damages award of no more than $75,000; the jury had awarded $200,000. 101 F.3d at 813. The basis for the court's conclusion was that it had closely scrutinized but ultimately approved awards of substantially less than $200,000 in cases where the plaintiffs suffered "numerous and severe physical and psychological harms." *Id.* The defendant's conduct in *Lee*, not having caused the plaintiff such acute trauma, was not "remotely" as reprehensible. *Id.* In the later case of *DiSorbo v. Hoy*, the Second Circuit remitted a punitive damages award of $1.275 million to $75,000; the claims were excessive force and abuse of process. It was clear in *DiSorbo* that the plaintiff was severely beaten by the defendant police officer – the Second Circuit described the case as involving "heinous acts of police aggression" – who arrested her and her sister because she resisted his advances. 343 F.3d at 188-89.

In *Dean v. Olibas*, the Eighth Circuit sustained a $70,000 punitive award against a bail bondsman after the jury found him liable for causing the police to wrongfully arrest and book the plaintiff. 129 F.3d at 1007-1008. A key component of the *Dean* court's rationale was its concern that, as a bail bondsman, the defendant might "have other opportunities to knowingly initiate the arrest of innocent people" and cause them to suffer the indignity of detention in jail and prosecution. *Id.* Finally, in *Williams v. Kaufman County*, the Fifth Circuit sustained a $15,000 per-plaintiff punitive award against a police officer for having conducted illegal strip searches of the plaintiffs. 352 F.3d at 1016. The award satisfied *Gore* scrutiny, the court concluded, because it was "not unreasonable in light of the violations that took place" and in light of awards in similar cases. *Id.*

Our decision in *Gregory* and our review of these cases from other circuits leads us to two important conclusions: First, substantial punitive awards in § 1983 cases, not

surprisingly, tend to accompany conduct that results in physical or psychological harm. Second, in the typical § 1983 case in which punitive damages are awarded, the defendant is an individual police officer, not the police department or municipality (which, odds are, have deeper pockets than the officer), let alone a deeply pocketed company, which the casino indisputably is. We have not found a case in which punitive damages were awarded based exclusively on a finding that the defendant unlawfully arrested the plaintiff and the award was challenged as unconstitutionally excessive. In addition, while we have said that the unlawful arrest of Romanski and the manner in which Defendants treated her are sufficiently reprehensible to warrant a substantial punitive damages award, the harm that befell Romanski is not as severe as the harm suffered by the plaintiffs in the cases just discussed (e.g., being severely beaten, strip-searched, or subjected to booking, jailhouse detention, and wrongful prosecution).

Nevertheless, a wrinkle peculiar to this case may render appropriate an award that exceeds the average punitive award for civil rights cases involving verdicts of this type. The defendant here is a casino, which, at the time of the verdict, yielded a daily intake of nearly $1,000,000. "Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of [the defendant's financial position] to the State's interest in retribution ...." *Gore,* 517 U.S. at 591, 116 S.Ct. 1589 (Breyer, J., concurring); *see TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 462 & n. 28, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (plurality opinion); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 21-22, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The defendant's financial position is equally relevant to the State's interest in deterrence, which is also a valid purpose of punitive damages. *Haslip,* 499 U.S. at 21-22, 111 S.Ct. 1032; *Lee,* 101 F.3d at 813 (citation omitted).

At the same time, a defendant's wealth could heighten the likelihood of juror caprice. Thus the Supreme Court recently reiterated that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427, 123 S.Ct. 1513 (citation omitted). Common sense gives us an additional reason to view skeptically the generic proposition that a high punitive award is necessary because of the wealth of the defendant. The Supreme Court said in *Gore* that "[t]he sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal." 517 U.S. at 584, 116 S.Ct. 1589. The upshot is two-fold: we must take into account the casino's wealth to ensure that the punitive damages award will further the interests it is designed to advance; but we must also ensure that our exacting appellate review results in an award that is not significantly higher than is necessary to further those interests.

Before proceeding to the third *Gore* guidepost, we take a final stab at putting the $875,000 punitive damages award in context. *See Lee*, 101 F.3d at 811. We have reviewed one roughly analogous case in which a state court examined a substantial punitive award levied against a corporate defendant for conduct roughly similar to what occurred here. In that case, the plaintiff, a pregnant woman shopping on Christmas eve with her two children, brought a malicious prosecution claim against Wal-Mart after she was wrongly accused of shoplifting a telephone, detained briefly at the store, arrested by the police, charged for theft, jailed, and tried, all at Wal-Mart's behest. *Wal-Mart Stores, Inc. v. Goodman*, 789 So.2d 166, 171 (Ala.2000). A jury awarded the plaintiff $200,000 in compensatory damages for mental anguish and $3 million in punitive damages, the latter because it was clear that Wal-Mart could have taken steps that would have quickly exonerated the plaintiff. *Id.* at 173. The Supreme Court of Alabama concluded that *Gore* permitted a

punitive-compensatory ratio of no greater than 3-to-1 on the ground that Wal-Mart's conduct, although it was reprehensible, did not cause the plaintiff physical injury. *Id.* at 181. Accordingly, the post-remittitur punitive award was $600,000. The *Goodman* case is not directly on-point - it involved conduct of a different character than that which occurred here and a substantial compensatory award – but it nevertheless assists us in completing the backdrop against which to evaluate the size of the punitive damages award assessed against the casino.

3. Sanctions for Comparable Conduct

"Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *Gore,* 517 U.S. at 583, 116 S.Ct. 1589. The purpose of this guidepost reflects an elementary principle of due process – namely, that the defendant must have been provided "fair notice" that its conduct would subject it to a penalty on the order of the punitive damages award. *Id.* at 584, 116 S.Ct. 1589; *Campbell,* 538 U.S. at 428, 123 S.Ct. 1513. Notice of possible penalties is not to be confused with notice of the unlawfulness of the underlying conduct; the latter is irrelevant to the constitutionality of a punitive damages award. *Gore,* 517 U.S. at 580, 116 S.Ct. 1589; *DiSorbo,* 343 F.3d at 186; *Lee,* 101 F.3d at 809.

We have already canvassed the most comparable cases we have found; indeed, this case is an occasion where the ratio and comparable conduct guideposts substantially overlap. Still, the question here is not whether similar punitive awards for similar conduct were held constitutional in prior cases but whether the casino had fair notice that conduct of the sort that occurred here might result in penalties, fines, or punitive damages on the order of $875,000. *See Campbell,* 538 U.S. at 428, 123 S.Ct. 1513; *Gore,* 517 U.S. at 584, 116 S.Ct. 1589. The parties do not address whether Defendants' conduct might have implicated

any Michigan civil or criminal penalties such that Defendants would have been on notice of specific penalties. We note that the district court concluded that the unlawful arrest of Romanski would not have subjected Brown or the casino to any specific statutory civil or criminal penalties. We take no issue with this account in light of the parties' silence on the question.

In a general sense, of course, the casino had fair notice that a verdict against a state actor for violating someone's constitutional rights might result in a punitive damages award if the conduct is sufficiently egregious. *See Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The civil rights cases we canvassed, therefore, provided some notice as to potential punitive damages awards for § 1983 liability. Accordingly, we conclude the casino had fair notice that it might face punitive damages for sanctioning the type of civil rights violation that Romanski endured here but it did not have notice that an award as high as $875,000 was likely. *See Campbell*, 538 U.S. at 428, 123 S.Ct. 1513; *Gore*, 517 U.S. at 584, 116 S.Ct. 1589. This guidepost militates in favor of reducing the award.

4. Conclusion

The lasting impression this case leaves is one of egregious misconduct – a *de jure* police officer's gratuitous abuse of power, sanctioned by a casino, that left a 72-year-old woman the victim of needless indignities and humiliation. In moral terms, the casino's conduct was significantly reprehensible; it surely was reprehensible enough to warrant a substantial punitive damages award. In comparative terms, however, because Romanski was not beaten, charged or tried, the conduct here was not as reprehensible as the defendants' conduct in some of the civil rights cases we have canvassed. In addition, the casino did not have fair notice that a verdict for unlawful arrest – unaccompanied by a verdict for assault, excessive force, or malicious prosecution, or proof of physical

injury or sustained psychological trauma – would result in a penalty on the order of $875,000.

However, we must consider the *Gore* guideposts in their totality and, furthermore, we must ensure that a punitive damages award actually achieves the twin purposes of punishment and deterrence. As the Second Circuit aptly put it in *Lee:* "In gauging excessiveness, we must keep in mind the purpose of punitive damages: 'to punish the defendant and to deter him and others from similar conduct in the future.' " 101 F.3d at 809 (citing *Vasbinder v. Scott,* 976 F.2d 118, 121 (2d Cir.1992)); *see also Gore,* 517 U.S. at 568, 116 S.Ct. 1589; *Haslip,* 499 U.S. at 21-22, 111 S.Ct. 1032. Furthermore, "deterrence is directly related to what people can afford to pay." *Lee,* 101 F.3d at 813 (citation omitted); *see also Gore,* 517 U.S. at 591, 116 S.Ct. 1589 (Breyer, J., concurring). Consequently, it was entirely appropriate for the jury to craft a punitive damages award that was sensitive to the casino's financial position. And we too must be sensitive to this reality in reviewing the award.

Under the totality of the circumstances, mindful that the Supreme Court has charged us with "considering whether less drastic remedies [than the jury's punitive damages award] could be expected to achieve" the State's goal of deterring future misconduct, *Gore,* 517 U.S. at 585, 116 S.Ct. 1589, *and* with ensuring that punishment and deterrence are achieved, we think an award of no greater than $600,000 – sixty per cent of the casino's daily intake at the time of the verdict – would satisfy the demands of the due process clause. It cannot be seriously contended that this is an insignificant amount for the casino.[6] Moreover, a $600,000 award is comfortably within the ballpark of the punitive damages awards in the civil rights cases we have canvassed, *see esp.*

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[6] We note that neither Romanski nor the district court considered *Gore*'s requirement that less drastic measures must be evaluated to ensure that the ultimate penalty imposed comports with due process.

Goodman, 789 So.2d at 171 (involving a corporate defendant); the less reprehensible conduct in this case being counteracted by the need to make the award large enough to actually punish and deter, something that is ordinarily not a challenge in civil rights cases.

Accordingly, on remand, the district court must give Romanski the option of agreeing to remit $275,000 and to accept a $600,000 punitive damages award or to proceed with a new trial on the issue of damages. *See Meyers v. Wal-Mart Stores, Inc.*, 257 F.3d 625, 636 (6th Cir.2001); *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1396 (6th Cir.1990); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 976 (6th Cir.1974); *DiSorbo*, 343 F.3d at 189; *Lee*, 101 F.3d at 813.

III. CONCLUSION

We VACATE the punitive damages portion of the district court's judgment, AFFIRM the judgment in all other respects, and REMAND for proceedings consistent with this opinion.

FARRIS, Circuit Judge, dissenting.

The Michigan statute upon which the majority relies places specific limitations on private security guards that distinguish their powers of detention from those of public peace-officers. *See* M.C.L. § 338.1080. Although security guards can make arrests without a warrant, M.C.L. § 338.1080 emphasizes that their authority is limited by the bounds of their *private employment:* They can only detain individuals on company property, during their hours of employment, while wearing a company uniform.[7]

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[7] The majority relies on the holdings in *Payton v. Rush-Presbyterian* and *Henderson v. Fisher* for the proposition that the geographical limitations on security guards' authority in M.C.L. § 338.1080 do not alter the "plenary" nature of their power. (Op. 647.) Those cases are distinguishable from this case. The Chicago ordinance cited in *Payton*

The Michigan Supreme Court has specifically rejected the majority's conclusion that licensed, private security guards are necessarily state actors. (Op. 645-46.)

> [D]efendant believes that the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law, subject to constitutional restraints. We disagree. We do not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings. *City of Grand Rapids v. Impens*, 414 Mich. 667, 327 N.W.2d 278, 281 (1982).

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states that private officers "possess the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged." *Payton v. Rush-Presbyterian*, 184 F.3d 623, 625 (7th Cir.1999). Unlike the Michigan statute, the Chicago ordinance grants special police officers broad police powers without specific geographical limitations. Moreover, the ordinance also forces special police officers to comply with all rules and regulations governing public officers and requires them to report directly to the superintendent of police. *Id.* Likewise, *Henderson v. Fisher* also differs significantly from this case. In *Henderson* the court held that the University of Pittsburgh, where the campus police worked, was essentially a state institution. *Henderson v. Fisher*, 631 F.2d 1115, 1118 (3d Cir.1980) ("[T]he University of Pittsburgh has lost its wholly private charter and has become an instrumentality of the Commonwealth ...."). Furthermore, the Pennsylvania statute cited in *Henderson* extends the authority of campus officers beyond the bounds of state universities, permitting them to "exercise those powers ... conferred pursuant to this section within the municipality for the limited purpose of aiding local authorities in emergency situations." 71 Pa. Stat. Ann. § 646 (2005). Due to M.C.L. § 338.1080's comparative limitations on the authority of private security guards, I believe this case is more akin to *Wade v. Byles*, than either *Payton* or *Henderson*. *See Wade v. Byles*, 83 F.3d 902, 904 (7th Cir.1996) (finding an absence of state action where guards were not allowed to pursue individuals outside the lobby of city housing authority buildings).

By its own account, in granting licenses to private security guards, the State of Michigan has not attempted to, "cloak[ ] private individuals with virtually the same power as public officers." *See Payton,* 184 F.3d at 629. But even if the casino's private security guards did hold plenary arrest authority under Michigan law, it would still be necessary to establish that they actually exercised this authority during the detention of Romanski.

In applying the public interest test, it is the exercise, and not the possession, of powers belonging exclusively to the state that determines whether the action was under color of state law. *See Chapman v. Higbee Co.,* 319 F.3d 825, 834 (6th Cir.2003) (en banc) ("Under the public function test, a private party is deemed a state actor if he or she exercised powers traditionally reserved exclusively to the state."); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 302-03, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (holding that actions can only be attributed to the state if they were "exclusively and traditionally" public); *see also Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 158, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) ("[V]ery few [functions] have been 'exclusively reserved to the State.' " (citation omitted)).[8] Romanski has presented no evidence that the State of Michigan has traditionally and exclusively reserved the power to make warrantless arrests. To the contrary, the Michigan Supreme Court has held that licensed private security guards do not act as state actors in detaining shoplifting suspects.

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[8] While the Supreme Court has held that certain actions may be public even if they could have been undertaken in a private capacity, *see Griffin v. Maryland,* 378 U.S. 130, 135, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964); *West v. Atkins,* 487 U.S. 42, 56 n. 15, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), these instances involve preventing a state from avoiding a constitutional duty by delegation, *see Georgia v. McCollum,* 505 U.S. 42, 53, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *Wade,* 83 F.3d at 906, or an actor with parallel roles "purporting to act" in the state role, *see Flagg Bros.,* 436 U.S. at 163 n. 14, 98 S.Ct. 1729.

Impens, 327 N.W.2d at 281. ("Their [guards'] role may be viewed as an extension of the shopkeepers' privilege to detain for a reasonable period of time a person suspected of theft or failure to pay.").

Viewing the facts in the light most favorable to defendants, I am not convinced that the casino security guards acted under color of state law in detaining Romanski. The four security guards approached and then later escorted Romanski off-the-floor because they believed she had committed a crime and, as the guards contend, she had become loud and belligerent when they attempted to explain the casino's policy against "slot-walking." Even Romanski concedes that Brown detained her, not simply because of her attitude, but because she suspected Romanski of theft. (Op. 633-34.) The law on this point is very clear: Investigation of a possible crime on an employer's premises "does not transform the actions of a private security officer into state action." *Chapman*, 319 F.3d at 834. That the "crime" was a "trifle," as the opinion notes, and that the guard's actions may have constituted an egregious tort, is irrelevant.

As in *Chapman*, where a security guard conducted an unauthorized strip search of a female customer, the behavior of the casino security guards in this case was outrageous and abusive, but it was clearly meant to serve the interests of the employer. *Id.* The humiliating detention of Romanski was based solely on the enforcement of an inane casino policy and ultimately involved collection of personal data to prevent her from returning to the casino for six months. However, the security guards neither threatened nor actually invoked the authority of the state during the incident.[9]

Because the actions of the casino's security guards failed to constitute state action, I would dismiss Romanski's § 1983 claim. In the absence of subject-matter jurisdiction, I would

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[9] As the majority notes, the Michigan State Police were notified regarding Romanski's ejection. (Op. 635-36.)

remand her case to the district court with directions to vacate and remand to state court.

I respectfully dissent.

United States District Court,
E.D. Michigan,
Southern Division.

Stella ROMANSKI, Plaintiff,
v.
DETROIT ENTERTAINMENT, L.L.C. d/b/a MotorCity Casino, a Michigan Corporation,
Marlene Brown, Gloria Brown, Robert Edwards, and Joetta Stevenson, Jointly and Severally, Defendants.

No. 02-73358.

May 28, 2003.

Neil H. Fink, Birmingham, MI, for Plaintiff.

Robert F. MacAlpine, John B. Farrell, Garan Lucow, Detroit, MI, for Defendants.

OPINION AND ORDER

ZATKOFF, Chief Judge.

This matter is before the Court on Defendants' Motion for Summary Judgment. Plaintiff responded. The Court finds that the parties have adequately set forth the relevant law and facts, and that oral argument would not aid in the disposition of the instant motion. *See* E.D. MICH. LR 7.1(e)(2). Accordingly, the Court ORDERS that the motion be decided on the briefs submitted. For the reasons set forth herein, Defendants' Motion for Summary Judgment is DENIED.

I. BACKGROUND

Plaintiff's Second Amended Complaint was removed by the Defendants from the Wayne County Circuit Court on August 19, 2002. Her Second Amended Complaint contains the following four counts:

1. False Arrest and Imprisonment;
2. Defamation;
3. Intentional Infliction of Emotional Distress; and
4. Violation of 42 U.S.C. § 1983.[1]

Defendants filed a motion for summary judgment on these counts. The Court shall now describe the facts surrounding Plaintiff's action, and will then briefly describe the procedural history of this action.

A. Factual History

Ms. Stella Romanski, a grandmother of nine children, and her two friends, Ms. Dorothy Dombrowski and Ms. Linda Holman, enjoyed spending time together by periodically visiting casinos in the Detroit area. On August 7, 2001, Ms. Romanski, and her two friends took advantage of a promotion offered by Defendant MotorCity Casino.[2] Basically, for $9.00, MotorCity Casino, which is located near downtown Detroit, Michigan, offered to provide transportation to and from the casino, as well as a complementary lunch at the casino's Classic Buffet. In particular, in the morning, a casino bus would pick up patrons in Sterling Heights, Michigan – which is a suburb of Detroit – and would drive them to the casino. The patrons would then spend several hours in the casino, and, in the evening, a casino bus would return the patrons to Sterling Heights.

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[1] Plaintiff's Second Amended Complaint contained five "counts," however, one of her counts seeks "exemplary damages," which, by itself, is not a cause of action.

[2] "MotorCity" is the way that the casino's name appears in the documents submitted.

Ms. Romanski and her friends arrived at the casino late in the morning, roughly around 11:30 a.m. They had agreed to split up, however, they would meet each other for lunch at the buffet at 1:30 p.m. After they went their separate ways, Ms. Romanski headed towards the "nickel" slot machines. Over the course of the next hour, she primarily played at one machine. At about 12:30, she stood up, walked by some of the other slot machines in her area, and returned to the machine that she had been playing for the previous hour. While she was walking around, she noticed that there was a token worth five cents lying in the tray of an abandoned slot machine. She picked it up and took it with her. When she returned to the slot machine that she had been playing, she put a twenty-dollar bill into the machine, along with the five cent token. What happened next is subject to dispute.

Ms. Romanski alleges that she began playing the machine again; she testifies that she knew that she played it thirteen times because she counted her money when she returned home. While she was playing the machine, four security officers surrounded her, and asked to her to accompany them. The security officers, still surrounding her, led her to the casino's security office. When they got to the security office, Ms. Romanski was seated at a desk, and three female security officers surrounded her. One officer informed Ms. Romanski that she stole a coin from the slot machine tray, and that she committed a crime. Ms. Romanski began to cry at the thought that she, a grandmother of nine children, could commit a crime. The security officers made her cash out. After her money was counted, she had $14.10; the security officers gave her a ten-dollar bill, four one-dollar bills, and two nickels. A security officer, however, kept one of the two nickels; this way, the casino had recovered the money that was stolen from it.

Afterwards, the security officers took a photograph of Ms. Romanski, and photocopied her driver's license. A security officer also asked for Ms. Romanski's Social Security number; while Ms. Romanski was hesitant to

surrender such information at first, the security officer told Ms. Romanski that she was a "policewoman," afterwards Ms. Romanski surrendered the information. A few minutes later, a woman approached Ms. Romanski, and informed her that she was banned from the casino for six months, and that she had to leave. It occurred to Ms. Romanski that it was almost time for her to meet her friends for lunch, accordingly, she requested to at least have lunch with her friends; a security officer, however, denied that request, and informed Ms. Romanski that she had lost all of her rights, and that she was banned from the casino.

After Ms. Romanski was informed that she had to leave the casino, three security officers escorted her out of the casino. Ms. Romanski stated that she felt sick, and that she wanted to use the bathroom. While they let Ms. Romanski use the restroom, one of the female security officers followed her into the restroom, and then followed Ms. Romanski into her stall. After Ms. Romanski was done with the restroom, the security officers escorted her to the valet area. They pointed to an area some distance away, and stated that her bus would arrive there at 3:00 p.m.

After the security officers left, Ms. Romanski used a cellular telephone to contact her friends and inform them that she had been banned from the casino. Her friends thought it was a joke at first, and could not believe that Ms. Romanski would steal anything. Concerned, however, Ms. Holman and Ms. Dombrowski asked casino personnel if what Ms. Romanski told them was true. Sometime later, casino personnel informed Ms. Romanski's friends that Ms. Romanski was banned from the casino for theft.

Around 3:00, Ms. Romanski left the valet area and walked over to the area where she was told to go in order to wait for a bus to take her home. After she crossed Grand River Ave., and negotiated relatively heavy traffic, she discovered that it was not the proper bus, and that her bus would not arrive for another two hours. Because Ms.

Romanski was not allowed back into the casino, she had to wait outside on a hot day for the next bus to arrive.

A short time later, Ms. Romanski's two friends found her. The three women went back to the casino, and waited in the vestibule area in order to get out of the heat. Casino security officers noticed that Ms. Romanski had re-entered the casino; they approached the three women and informed them that Ms. Romanski was banned, and had to wait outside. In response, one of Ms. Romanski's friends, Ms. Dombrowski, stated that she thought that this was a "stupid" situation. One of the security officers took offense to the comment, and accused Ms. Dombrowski of calling the security officer stupid, and began to physically intimidate Ms. Dombrowski. The three women then left the casino again, and waited for the bus to take them back to Sterling Heights.

Defendants' account of the facts is different. Defendants state that a security officer, Defendant Marlene Brown, was working undercover, or in "plainclothes" on August 7, 2001. She noticed Ms. Romanski take a token worth a nickel out of the tray of a slot machine that she was not playing. She then saw Ms. Romanski prepare to play the token; Ms. Romanski placed the token in the slot machine, but before she had a chance to play it, Defendant Marlene Brown approached Ms. Romanski, and informed Ms. Romanski that she had taken casino property. Defendant Marlene Brown explained that the casino had a policy in which it considered money left in a tray of a slot machine to be casino property, and that Ms. Romanski had therefore taken casino property. In response, Ms. Romanski became hostile and raised her voice in objection. Defendant Marlene Brown, who was new at doing undercover security work, signaled to the other undercover security officers, Defendants Gloria Brown and Robert Edwards, that she needed assistance. When it appeared that Ms. Romanski was not going to calm down, they decided to take her to the security office; during her deposition, Defendant Marlene Brown stated: "Well, my instinct was to just tell her and let her just go finish gaming, okay, but like I

said, she was getting kind of loud, and that's when I called Sky[3], and that's when I called my partners. That's when I was instructed to bring her to the office." *See* Dep. of M. Brown, 65.

Defendants also state that after Ms. Romanski was taken to the security office, the decision was made to ban her from the casino largely because she continued to be hostile -- even belligerent. Indeed, Defendant Marlene Brown stated during her deposition that Ms. Romanski was banned from the casino "[b]ecause of her attitude," and not because she committed a "crime." *See id.* at 75. After she was banned, Ms. Romanski was led to the air-conditioned valet area, where she was allowed to remain until her bus arrived. Defendants state that Ms. Romanski freely chose to leave the valet area and wait outside in the heat. Defendants also state that after Ms. Romanski met with her friends, the three women decided to wait in the lobby of the casino until their bus arrived. When Defendant Marlene Brown approached to ask Ms. Romanski to leave, Ms. Romanski's friends began to yell at Defendant Marlene Brown and call her "stupid."

These are the disputed facts. The parties do not dispute the fact that the casino has a policy that states that tokens found in the trays of abandoned slot machines are considered casino property, and no one, except the person who won it, has a right to pick up such a token. If, however, a token is found on the floor, anyone can pick it up and keep it. In addition, it is not disputed that this policy is not made known to the public; there are no signs or other warnings posted in the casino to inform patrons of such a policy. It is this policy that is at the heart of the present dispute.

B. Procedural History

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[3] "Sky" refers to the casino's system of surveillance cameras. Despite the existence of security cameras in the casino, Defendants are not able to produce a video tape of the incidents at issue.

Plaintiff first filed her complaint in Wayne County Circuit Court on November 9, 2001. On August 19, 2002, the Wayne County Circuit Court granted Plaintiff leave to file her Second Amended Complaint. The most notable feature about Plaintiff's Second Amended Complaint is that it added a claim under 42 U.S.C. § 1983. Defendants removed to this Court on August 19, 2002.

On September 4, 2002, the Court ordered the parties to Show Cause as to why Plaintiff's claim under 42 U.S.C. § 1983 should not be dismissed, and Plaintiff's state law claims should not be remanded. In particular, the Court noted that a defendant must act under the color of state law to be held liable under § 1983, and that all of the Defendants in this action are private actors. Both parties filed responses. On September 19, 2002, the Court found that it had jurisdiction under § 1983, because the Defendant security officers are state actors acting under the color of state law. The Court reasoned that the Defendant security officers were vested with all the authority of a peace officer while they were acting within the scope of their authority. In addition, the Court retained jurisdiction over the supplemental state law claims.

Presently, Defendants, who removed this action to this Court, seek to have this action remanded to state court.

II. LEGAL STANDARD

Summary judgment is appropriate only if the answers to interrogatories, depositions, admissions, and pleadings combined with the affidavits in support show that no genuine issue as to any material fact remains and the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c). A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citations omitted). In application of this summary judgment standard, the Court must view all materials supplied, including all pleadings, in the light most favorable

to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted).

The moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. *See* FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. The non-moving party must do more than show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for summary judgment. *See Moore v. Philip Morris Cos.*, 8 F.3d 335, 339-40 (6th Cir.1993).

III. ANALYSIS

The Court shall now rule upon Defendants' arguments in the most logical order.

A. 42 U.S.C. § 1983

The Court shall first rule upon Defendants' argument that the Court lacks jurisdiction over this matter. Defendants argue that the individual Defendant security officers were not state actors acting under color of state law, and therefore, cannot be found liable under 42 U.S.C. § 1983. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). Thus, the Court would lack jurisdiction

to hear this action, and this action should be remanded to the Wayne County Circuit Court.[4]

1. State Action

In its September 19, 2002, Order, the Court found that the individual Defendant security officers were state actors acting under color of state law. The Court based its decision on the fact that under Michigan law, an employer may maintain private security guards in order to protect its property, however, it may also employ private security police. *See* MICH. COMP. LAWS § 338.1079. A private security police officer who is properly licensed by the State of Michigan has the authority to arrest a person without a warrant when that private security police officer is on his employer's property. *See* MICH. COMP. LAWS § 338.1080. This authority to make warrantless arrests is the same authority that is granted to a peace officer. *See id.* Any person seeking a license to become a private security police officer must comply with the requirements found in the statute, *see* MICH. COMP. LAWS § 338.1067, and must comply with the training requirements promulgated by the Michigan Department of Consumer and Industry Services, *see* MICH. COMP. LAWS § 338.1081. After reviewing the relevant case law, the Court found that the individual Defendant security officers were state actors for purposes of 42 U.S.C. § 1983 because they are properly licensed security officers who have police powers pursuant to MICH. COMP. LAWS § 338.1080.

Section 1983 provides:

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[4] The Court notes that Defendants removed this action to this Court. Defendants now argue that the Court was wrong to retain jurisdiction over this action, and argue that the Court should remand this matter. In so doing, however, Defendants are effectively arguing that not only was the Court wrong in retaining jurisdiction, but that Defendants themselves were wrong in removing the action in the first place. As the Court's analysis demonstrates, however, both the Court and the Defendants were right the first time.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law....

As this statute has been interpreted, Plaintiff must demonstrate that Defendants deprived her of a right secured by either the Constitution or a statute while Defendants were "acting 'under color of state law.'" *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir.2003) (en banc) (quoting *Wolotsky v. Huhn* 960 F.2d 1331, 1335 (6th Cir.1992)). Under § 1983, a private party's actions may constitute state action; those actions, however, must be " 'fairly attributable to the state.' " *See id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)). State action may be found if a private person exercised powers that are traditionally reserved to the State. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *see also Chapman*, 319 F.3d at 833. This is known as the public function test. *See Chapman*, 319 F.3d at 833. The public function test is narrowly interpreted. *See id.* Examples of functions that are typically reserved to the State include exercising eminent domain and holding public elections. *See id.* (citations omitted).

The United States Supreme Court has never determined whether a private security guard who is cloaked with the authority of a police officer is a state actor performing a public function that is traditionally reserved to the state. *See Payton v. Rush-Presbyterian-St. Luke's Med Ctr.*, 184 F.3d 623, 628 (7th Cir.1999) (citing *see Flagg Bros., Inc., v. Brooks*, 436 U.S. 149, 163-64, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)); *see also* 1A Martin A. Schwartz & John E. Kirklin,

Section 1983 Litigation: Claims and Defenses § 5.13 n. 233 (3d ed.1997). A number of federal courts have confronted this question, however, and have held that a private security guard is a state actor when he or she is vested with the authority of a police officer. *See Payton,* 184 F.3d at 628-29 (cataloguing and discussing relevant cases). For instance, in *Payton,* private security personnel could be licensed by the City of Chicago to serve as "special police officers;" these special police officers had all the powers of a regular Chicago police officer. *See id.* at 624-25. The Seventh Circuit found that such privately employed special police officers could be found to be state actors performing a public function that is traditionally reserved to the State. *See id.* at 630. Likewise, in *Henderson v. Fisher*, the Third Circuit held that the campus police at the University of Pittsburgh are state actors performing a public function, and partially based its decision on the fact that a Pennsylvania statute "has delegated to the campus police of the University of Pittsburgh the very powers which the municipal police force of Pittsburgh possesses." 631 F.2d 1115, 1118 (3d Cir.1980). In making its decision, the Third Circuit noted: "[T]he delegation of police powers, a government function, to campus police buttresses the conclusion that the campus police act under color of state authority." *Id.* And, at issue in *Rojas v. Alexander's Dept. Store, Inc.*, was a New York City ordinance that permitted private security guards to obtain a license that vested them with all the power of the city police; the Eastern District of New York held that: "[s]uch a special patrolman, with the power to arrest, is a government official subject to section 1983 liability." 654 F.Supp. 856, 858 (E.D.N.Y.1986) (citing *Williams v. United States,* 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951)).

After reviewing the decisions listed above, as well as a number of other federal court decisions, the Court finds these decisions to be persuasive. At common law, private citizens had certain powers that resemble police authority. For example, at common law, a private storekeeper had a right to

protect his or her property, and could thus detain an individual if the shopkeeper suspected that individual of theft. *See City of Grand Rapids v. Impens,* 414 Mich. 667, 327 N.W.2d 278, 281 (1982) (citation omitted). As another example, at common law, private persons had the right to use deadly force in self-defense. *See Payton,* 184 F.3d at 629 (citing *Wade v. Byles,* 83 F.3d 902, 905 (7th Cir.1996)). Other powers, however, such as the power to arrest others for violations of State statues or local ordinances, are powers that are vested in the State alone, and cannot be exercised by a private individual unless that individual is vested with such authority by the State. *See Payton* 184 F.3d at 630; *see also Thompson v. McCoy,* 425 F.Supp. 407, 409-10 (D.S.C.1976). Thus, a private individual who is vested with the powers of a police officer -- which are powers that are only vested in the State, and those private individuals to whom the State has given such powers – is a state actor acting under color of state law for purposes of § 1983.

Contrary to Defendants' assertions, this rationale is contradicted by neither the Sixth Circuit's recent decision in *Chapman v. Higbee Co.,* 319 F.3d 825 (6th Cir.2003) (en banc), nor the Michigan Supreme Court's decision in *City of Grand Rapids v. Impens,* 414 Mich. 667, 327 N.W.2d 278 (1982). In *Chapman,* a private security guard working at a department store suspected that the plaintiff was stealing from the security guard's store, and temporarily detained the plaintiff to do an investigation. *See Chapman,* 319 F.3d at 828. The Sixth Circuit held that the fact that a private security guard may investigate a crime does not transform the security guard's action into state action. *See id.* at 834. In supporting its rationale, the Sixth Circuit quoted the Fifth Circuit, and stated:

> A merchant's detention of persons suspected of stealing store property simply is not an action exclusively associated with the state. Experience teaches that the prime responsibility for protection of personal property remains with the individual. A

> storekeeper's central motivation in detaining a person whom he believes to be in the act of stealing his property is self-protection, not altruism. Such action cannot logically be attributed to the state.

Id. (quoting *White v. Scrivner Corp.*, 594 F.2d 140, 142 (5th Cir.1979)). Therefore, there is nothing inconsistent with what the Sixth Circuit stated in *Chapman*, and this Court's holding that the individual Defendant security officers are state actors: a security guard that is merely exercising common law rights, such as detaining individuals who are suspected of theft, is not a state actor; a security guard that exercises authority that is traditionally reserved to the State, however, such as the power to arrest, is a state actor acting under the color of state law.

The Michigan Supreme Court's holding in *Impens* is also consistent with the Court's ruling that the individual Defendant security officers are state actors. In *Impens*, private security guards employed at a retail store detained an individual who was suspected of shoplifting. *See Impens*, 327 N.W.2d at 279. The security guards were able to elicit a written confession from the individual, and then turned that confession over to the Grand Rapids police. *See id.* The individual argued that the signed confession should have been suppressed because he was not read his *Miranda* warnings. *See id.* at 279- 80. The Michigan Supreme Court found that the confession was admissible, and held that the security guards were not law enforcement officials. *See id.* at 282. During its discussion, the Michigan Supreme Court noted that the security guards who took the confession were simply exercising the common law right to detain an individual suspected of theft. *See id.* at 281-82 (citations omitted). Therefore, upon reviewing this case law, the Court determines that there is nothing inconsistent with the cases that Defendants cite and the Court's original holding that the individual Defendant security officers were state actors acting under color of state law.

In their final attempt to argue that the Court lacks subject matter jurisdiction, Defendants argue that the individual Defendant security officers in this action were doing nothing more than exercising their right to temporarily detain Plaintiff, and were not exercising their police – like authority, thus they were not acting as state actors. Indeed, Defendants maintain that Plaintiff was never actually arrested – she was never handcuffed nor patted down. Viewing the facts in the light most favorable to Plaintiff, however, the Court notes that a jury could find that the individual Defendant security officers in fact arrested her. Defendants did more than merely temporarily detain Plaintiff for the sake of investigating a crime: when Defendant Marlene Brown first approached Plaintiff, Defendant Brown lifted up her jacket and showed Plaintiff her security badge, as well as her handcuffs; meanwhile, Plaintiff was surrounded by a number of security officers while she was sitting at a slot machine, one of whom was wearing a security uniform; afterward, Plaintiff was surrounded by the security officers as they led her to the security office; after they got her into the security office, Plaintiff was made to sit at a table, and there were two security officers standing behind her, one security officers guarding the door, and another one, presumably Defendant Marlene Brown, "hover[ing]" over her – again, at least one security officer was uniformed; the Defendant security officers took a photograph of her, and photocopied her driver's license and Social Security card; although Plaintiff initially refused to hand over her Social Security card, she did so after one of the Defendant security officers, presumably Defendant Marlene Brown, stated that she was a "policewoman;" Plaintiff was not permitted to see her friends for lunch; in total, she was detained for roughly forty-five minutes to an hour; after her detention, she was escorted out of the casino by three Defendant security officers; and a Defendant security officer followed Plaintiff into the bathroom, and even stood in the same stall as Plaintiff. Clearly, a jury could find that Defendants did not simply

temporarily detain Plaintiff in order to investigate her potential theft of five cents.

2. Constitutional Violation

Defendants argue that even if the Court finds state action that they did not violate any of Plaintiff's constitutionally protected rights. In her Second Amended Complaint, Plaintiff alleges a violation of her Fourth and Fourteenth Amendment rights to be free from unreasonable seizures.[5] Defendants argue that even if Plaintiff was arrested that her arrest was supported by probable cause. Basically, Defendants state that Defendant Marlene Brown witnessed Plaintiff commit a crime by taking a token out of the tray of an abandoned slot machine, which is a crime, therefore, she had probable cause to arrest Plaintiff. *See Atwater v. City of Lago Vista,* 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

Defendants' argument fails for two reasons. First, Defendant Marlene Brown admitted during her deposition that the only reason Plaintiff was taken to the security office and was banned from the casino was because of her "attitude," and not because she actually stole anything from the casino. *See* Dep. of M. Brown, 65-66, 75. And second, Plaintiff correctly points out that a jury could find that she never actually stole anything from the casino.

Central to much of Defendants' argument that Plaintiff committed a crime is a Michigan statute that declares that a person commits a felony if that person:

> claims, collects, takes, or attempts to claim, collect or take money or anything of value in or from the gaming games, with intent to defraud, without having made a wager contingent on winning a

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[5] In her brief responding to Defendant's Motion for Summary Judgment, Plaintiff also states that her due process rights under the Fifth Amendment was violated. Plaintiff, however, does not raise this claim in her complaint; therefore, the Court shall not address a claim for a violation of due process.

> gambling game, or claims, collects, or takes an amount of money or thing of value of greater value than the amount won.

MICH. COMP. LAWS § 432.218(2)(j). The plain language of the statute demonstrates that an element of the offense is "intent to defraud." This necessarily implies that the victim – either the casino or another patron of the casino – must have had legal title to the property that is claimed or taken; obviously, a person can neither defraud himself, nor can he defraud anybody if he takes a piece of property that was abandoned. *See Courtney v. Feldstein*, 147 Mich.App. 70, 382 N.W.2d 734, 736 (1985) (stating that, under Michigan law, fraud requires damage to the victim). Thus, in the present action, in order to find that Plaintiff committed a crime, the Court must determine whether the casino had legal title to the five cents.

Defendants maintain that the five cent token that is at the center of this action belonged to the casino. Defendants base their assertion on the fact that the casino has a rule – which is not made known to the casino's patrons until after a patron violated the rule – that states, in essence, that if a token is found on the floor then anyone can pick it up and treat it as if it were his or her own; he or she may keep it or play it. If, however, a patron finds a token lying in the tray of an abandoned slot machine then the token is considered by the casino to be casino property, and nobody but the person who won that token can take it. Defendants' argument, however, is contrary to law.

When a person places money into a gambling game, that person is effectively entering into an aleatory contract with the casino; an aleatory contract is one in which a party's duty to perform is conditioned upon some fortuitous event, such as winning at a slot machine. *See* RESTATEMENT (SECOND) OF C ONTRACTS § 232 cmt. c (1981). Upon the happening of the fortuitous event, the casino is under an obligation to surrender money or some other valuable item to the other

party in the aleatory contract; in other words, the casino loses its legal right to the property, and the other party gains that right. Consequently, when a person is successful at a gambling game, such as a slot machine, and the slot machine pays that person, the casino loses its rights to the property paid, and the person who won the property becomes entitled to exclusive use and possession of the property.

Because, for the purposes of this motion, the Court views the facts in the light most favorable to the Plaintiff, it will assume that the token that Plaintiff found lying in the tray of the abandoned slot machine was won by another patron, however, that other patron walked away without collecting the token at issue; in short, the Court will assume that it was abandoned – the Court also notes that there is no other likely explanation for the token being in the tray of the slot machine. Thus, for purposes of this motion, the Court finds that the property was abandoned. Under Michigan law, the finder of abandoned property has a superior claim to said property than does the owner of the *locus in quo*. *See People v. Twenty-Seven Thousand Four Hundred Ninety Dollars*, 1996 WL 33348190, *1 (Mich.Ct.App. Nov.26, 1996) (citing and discussing MICH. COMP. LAWS § 434.21 *et. seq.*). Therefore, the Court concludes that Plaintiff had superior title to the five cents than did the casino. Accordingly, Plaintiff did not defraud, nor could she have had the intent to defraud, the casino because under Michigan law, Plaintiff – not the casino – had title to the abandoned piece of property.

As a consequence, the Court finds that a jury could find a constitutional violation pursuant to 42 U.S.C. § 1983. In particular, the individual Defendant security officers did not have probable cause to arrest Plaintiff because Plaintiff committed no crime; she simply claimed a piece of abandoned property.[6] This is not a case where a police officer

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[6] Indeed, if the jury finds the five cent token to have been abandoned, then it can be stated that the casino stole the five cents from Plaintiff, because she had title to it after she found it.

reasonably relied on a presumptively constitutional statute or ordinance that was subsequently declared unconstitutional. *See, e.g., Michigan v. DeFillippo,* 443 U.S. 31, 37-38, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). If it were, then the police officer would be entitled to a valid, good-faith defense. *See id.* Here, however, the individual Defendant security officers based their actions on an unpublished casino rule that is inconsistent with Michigan law. It is a general axiom that ignorance of the law is no excuse. *See City of Kentwood v. Estate of Sommerdyke,* 458 Mich. 642, 581 N.W.2d 670, 683 (1998) (Taylor, J., concurring in part and dissenting in part). Consequently, the individual Defendant security officers cannot claim that they reasonably relied on the unpublished casino rule[7] in good faith. Accordingly, a jury can find that

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[7] This rule can be described as a "secret" rule, which is kept secret until the time someone violates the rule. For instance, during her deposition, Defendant Joetta Stevenson stated the following:

Q: Now, is there a written casino policy that prohibits [taking tokens from the tray of an abandoned slot machine]?

A: No.

Q: Is there a sign anywhere in the casino that notifies patrons that they are not allowed to pick up coins they find in trays?

A: No.

Q: How is that policy at the casino communicated to patrons?

A: We tell them.

Q: And when do you tell them, as they enter the casino?

A: No.

Q: Do you tell them before they pick a coin out of the tray?

A: No.

Q: Do you tell them after they've been found picking a coin out of a tray?

A: Yes. Dep. of J. Stevenson, 46-47.

the individual Defendant security officers did not make a reasonable seizure, and thereby violated the Fourth Amendment.

3. Conclusion

The Court finds that the individual Defendant security officers were state actors acting under color of state law, and that a jury could find that they violated Plaintiff's right to be free from unreasonable seizures under the Fourth and Fourteenth Amendments to the United States Constitution. Therefore, the Court shall deny summary judgment on this issue.

B. False Arrest/False Imprisonment

In her complaint, Plaintiff alleged that she was subject to a false arrest/false imprisonment by the individual Defendant security officers. Under Michigan law, the elements of false arrest are: 1) an arrest; 2) of a person; 3) who is innocent of the charge on which he is arrested; 4) by the defendant or at his instigation; 5) without legal justification. *See Lewis v. Farmer Jack Div., Inc.*, 415 Mich. 212, 327 N.W.2d 893, 901 (Williams, J. dissenting). In turn, the elements of false imprisonment are: 1) actually confining another; 2) intentionally performing the act of confining another; 3) the act of confining another was performed without legal justification; and 4) the victim was aware of the confinement. *See Moore v. City of Detroit*, 252 Mich.App. 384, 652 N.W.2d 688, 691 (2002). Michigan courts have held that false arrest is one type of false imprisonment; when a person is falsely arrested, he or she is always falsely imprisoned. *See Moore*, 652 N.W.2d at 690 (citing *Lewis*, 327 N.W.2d at 900-01 n. 4 (Williams, J. dissenting)).

A jury could find that Plaintiff was falsely arrested and falsely imprisoned. As for the claim of false arrest, there is no question that Plaintiff is a person, and that she was detained by the individual Defendant security officers. And, for the reasons stated in *Sections IV. A. 1. & 2.* of this Opinion and Order, a jury could find that Plaintiff was

arrested. Therefore, the first, second, and fourth elements of this tort are satisfied. In addition, for the reasons set for in *Section IV. A. 2.* of this Opinion and Order, a jury could find that Plaintiff is not guilty of the crime of stealing money from the casino. Finally, for the reasons stated in *Section IV. A. 2.* of this Opinion and Order, the Court finds, as a matter of law, that the individual Defendant security officers cannot rely on the existence of the casino rule to provide legal justification their arrest of Plaintiff. Therefore, a question of fact exists on whether there was a legal justification for Defendants' arrest of Plaintiff. In short, there are facts sufficient to allow a jury to find for Plaintiff on all five elements of the claim.

By virtue of the fact that Plaintiff can succeed on a claim for false arrest, she may also succeed on a claim for false imprisonment. A jury can find for Plaintiff on her claim of false imprisonment. For the reasons stated in *Section IV. A. 1.* of this Opinion and Order, the Court finds that there are sufficient facts to allow a jury to find that Plaintiff was confined. The Court also finds that there is no dispute that Defendants intentionally confined Plaintiff and, if the jury finds that she was in fact confined, that she was aware of her confinement. The final element is whether there is any legal justification for Plaintiff's confinement; for the reasons stated in the previous paragraph, the Court finds that a jury can find for Plaintiff on this element, too.

Consequently, the Court finds that Plaintiff's claim for false arrest/false imprisonment survives Defendants' motion for summary judgment.

C. Defamation

Plaintiff alleges a claim for defamation. She basically alleges that Defendants defamed her when they accused her of stealing casino property. Under Michigan law, there are four elements in a defamation claim: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; (4) and

either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *See Kefgen v. Davidson,* 241 Mich.App. 611, 617 N.W.2d 351, 356 (2000).

Defendants raise two arguments as to why this claim should be dismissed: one procedural and one substantive. As for the procedural argument, Defendants argue that all of the elements of a claim for defamation must be specifically pleaded, including the defamatory words. *See Gonyea v. Motor Parts Fed. Credit Union,* 192 Mich.App. 74, 480 N.W.2d 297, 299 (1991). Defendants – relying on cases discussing libel, which is printed defamation, as opposed to slander, which is spoken defamation, and which is the type of defamation at issue here – argue that Plaintiff failed to specifically set forth the facts that her claims rely on, including the "defamatory words" and how these words were "published."

The Court disagrees. This action was originally filed in the Wayne County Circuit Court, and it complies with Michigan Court Rules. In particular, Plaintiff's complaint puts Defendants on notice of the facts that she alleges against them. *See* MICH. CT. R. 2.111(B)(1); *see also Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.,* 197 Mich.App. 48, 495 N.W.2d 392, 395 (1992) (stating that the rationale behind requiring specific pleadings in defamation actions is to put the defendant on notice). While the Court recognizes that Michigan courts, in libel cases, requires that the complaint list " 'the very words of libel,' " *see id.* (citations omitted), this is not a libel case. *See Sullivan v. River Valley Sch. Bd.,* 1997 WL 33344778, *3 (Mich.Ct.App.1997) ("Because libel is written, it must be pleaded verbatim; however, a more generous rule applies to slander because it cannot be retained verbatim.") (citations omitted). Plaintiff's complaint puts Defendants on notice of the claims against them; she alleges that Defendants "made false, malicious and defamatory accusations about Plaintiff, accusing her of committing a

crime, to wit stealing Defendant's property." There is no question that Plaintiff's complaint sets forth sufficient allegations to inform Defendants of her claim against them. Thus, Defendants' procedural argument fails.

Defendants' substantive argument fails as well. Defendants argue that they did not make a false statement when they accused Plaintiff of stealing a token; they argue that it is in fact true that Plaintiff stole a token; Defendants also argue that they never published their false statement to a third party. As for the former argument, the Court has already ruled that if the jury finds that the token at issue was abandoned, then Plaintiff had stolen nothing. As for the latter argument, there is deposition testimony that establishes that representatives of the casino, including the named Defendants, had informed Plaintiff's two friends, Ms. Holman and Ms. Dombrowski, that Plaintiff had "stolen" casino property. Defendants argue, without citation to authority, that Plaintiff was the first person to tell her friends that she was arrested for stealing, thus, Defendants cannot be held liable for subsequently telling Ms. Holman and Ms. Dombrowski about the theft. This argument also fails; the gravamen of the harm of slander is that a person's reputation in the eyes of others is reduced. *See Bonkowski v. Arlan's Dept. Store*, 383 Mich. 90, 174 N.W.2d 765, 767 (1970). Even if the third person knows the allegations to be untrue, an action for slander may be maintained. *See id.* In the present action, when Plaintiff first informed her friends that she was accused of stealing from the casino, her friends thought it was a joke. Employees of the casino, however, told Plaintiff's friends that she had stolen from the casino. A jury could find that this affected Plaintiff's reputation amongst her friends, if only for a short period of time.

Thus, there are sufficient facts on each element of a claim for defamation to allow this claim to proceed to a jury. As a result, Defendant's Motion for Summary Judgment on this claim fails.

D. Intentional Infliction of Emotional Distress

Plaintiff's final substantive claim is for intentional infliction of emotional distress. In order to prove a claim for intentional infliction of emotional distress in Michigan, Plaintiff must prove four elements: (1) extreme or outrageous conduct; (2) that intentionally or recklessly; (3) causes; (4) extreme emotional distress. *See Grochowalski v. Detroit Auto. Inter-Ins. Exch.*, 171 Mich.App. 771, 430 N.W.2d 822, 824 (1988).[8] Defendants argue that there are insufficient facts to find that what the individual Defendant security officers did is extreme or outrageous, or that Plaintiff suffered extreme emotional distress. Defendants argue that Plaintiff was merely "embarrassed" by the entire incident, and that the individual Defendant security officers were "merely doing their job."

The Court disagrees. There is sufficient evidence to allow a jury to find that after Plaintiff picked up an abandoned token that Defendants – by using the authority vested in them by the State of Michigan – surrounded her, arrested her, led her to the security office, prevented her from leaving the security office, and stole the five cents that she found from her. Afterwards, they surrounded her as they threw her out of the casino, and refused to let her use the restroom by herself. Defendants also prevented her from having lunch with her friends, falsely told her friends that she had stolen from them, and would not let her enter the casino

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[8] Defendants discuss the history of the tort of intentional infliction of emotional distress in Michigan, and notes that such a tort has yet to be recognized by the Michigan Supreme Court. The Court, however, shall not disregard Michigan Court of Appeals decisions regarding Michigan law unless the Court is convinced that the Michigan Supreme Court would hold otherwise. *See Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 10 F.Supp.2d 771, 777 (E.D.Mich.1998). Although the Michigan Supreme Court has yet to encounter a set of facts that would allow it to find intentional infliction of emotional distress, Defendants have not convinced the Court that the Michigan Supreme Court would not adopt such a tort in the event that it is confronted with the appropriate set of facts.

to get out of the heat. Viewing these facts in the light most favorable to Plaintiff, a jury could certainly exclaim "Outrageous!" *Graham v. Ford*, 237 Mich.App. 670, 604 N.W.2d 713, 716 (1999) (quoting *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 374 N.W.2d 905, 909 (1985)). Therefore, Defendants' motion for summary judgment shall not be granted as to Plaintiff's claim for intentional infliction of emotional distress.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

No. 04-1354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TELLA ROMANSKI,	)
	)
Plaintiff-Appellee,	)
	)
	)
	)
	)
	)
ETROIT ENTERTAINMENT, L.L.C., DOING BUSINESS S MOTORCITY CASINO., A MICHIGAN LIMITED IABILITY COMPANY, AND MARLENE BROWN,	)
	)
Defendants-Appellants,	)
	)
LORIA BROWN, ET AL.,	)
	)
Defendants.	)
	)

BEFORE: KEITH, CLAY and FARRIS,* Circuit Judges.

The court having received a petitioner for rehearing en banc, and the petitioner having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having

* Hon. Jerome Farris, Senior United States Judge for the Ninth Circuit Court of Appeals, sitting by designation.

favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petitioner were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Farris would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

RELEVANT STATUTORY PROVISIONS

42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

M.C.L. 338.1079, entitled "Licensure of private security police; rules; applicability of act to private security guards and police; use of pistols," provides in relevant part:

> Sec. 29. (1) The licensure of private security police shall be administered by the department of state police. The application, qualification, and enforcement provisions under this act apply to private security police except that the administration of those provisions shall be performed by, and the payment of the appropriate fees shall be paid to, the department of state police. The director of the department may jointly promulgate rules with the department of state police under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to facilitate the bifurcation of authority described in this subsection.

(2) This act does not require licensing of any private security guards employed for the purpose of protecting the property and employees of their employer and generally maintaining security for their employer. However, any person, firm, limited liability company, business organization, educational institution, or corporation maintaining a private security police organization may voluntarily apply for licensure under this act. When a private security police employer as described in this section provides the employee with a pistol for the purpose of protecting the property of the employer, the pistol shall be considered the property of the employer and the employer shall retain custody of the pistol , except during the actual working hours of the employee. All such private security people shall be subject to the provisions of sections 17(1) and 19(1).

M.C.L. 338.1080, entitled "Private security police officers; arrest powers; limitations," provides in relevant part:

Sec. 30. A private security police officer, as described in section 29, who is properly licensed under this act has the authority to arrest a person without a warrant as set forth for public peace officers in section 15 of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15, when that private security police officer is on the employer's premises. Such authority is limited to his or her hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer.

M.C.L. 764.15, entitled "Arrest by officer without warrant; situations; circumstances," provides in relevant part:

Sec. 15. (1) A peace officer, without a warrant, may arrest a person in any of the following situations:

(a) A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.

(b) The person has committed a felony although not in the peace officer's presence.

(c) A felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it.

(d) The peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.

(e) The peace officer has received positive information by written, telegraphic, teletypic, telephonic, radio, electronic, or other authoritative source that another peace officer or a court holds a warrant for the person's arrest.

(f) The peace officer has received positive information broadcast from a recognized police or other governmental radio station, or teletype, that affords the peace officer reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.

(g) The peace officer has reasonable cause to believe the person is an escaped convict, has violated a condition of parole from a prison, has violated a condition of a pardon granted by the executive, or has violated 1 or more conditions of a conditional release order or probation order imposed by a court of this state, another state, Indian tribe, or United States territory.

(h) The peace officer has reasonable cause to believe the person was, at the time of an accident in this state, the operator of a vehicle involved in the accident and was operating the vehicle in violation of section 625(1), (3), (6), or (7) or section 625m of the Michigan vehicle code, 1949 PA 300, MCL 257.625 and 257.625m, or a local

ordinance substantially corresponding to section 625(1), (3), (6), or (7) or section 625m of that act.

(i) The person is found in the driver's seat of a vehicle parked or stopped on a highway or street within this state if any part of the vehicle intrudes into the roadway and the peace officer has reasonable cause to believe the person was operating the vehicle in violation of section 625(1), (3), (6), or (7) or section 625m of the Michigan vehicle code, 1949 PA 300, MCL 257.625 and 257.625m, or a local ordinance substantially corresponding to section 625(1), (3), (6), or (7) or section 625m of that act.

(j) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of a snowmobile involved in the accident and was operating the snowmobile in violation of section 82127(1) or (3) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.82127, or a local ordinance substantially corresponding to section 82127(1) or (3) of that act.

(k) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of an ORV involved in the accident and was operating the ORV in violation of section 81134(1) or (2) or 81135 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81134 and 324.81135, or a local ordinance substantially corresponding to section 81134(1) or (2) or 81135 of that act.

(l) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of a vessel involved in the accident and was operating the vessel in violation of section 80176(1) or (3) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.80176, or a local ordinance substantially corresponding to section 80176(1) or (3) of that act.

(m) The peace officer has reasonable cause to believe a violation of section 356c or 356d of the Michigan penal code, 1931 PA 328, MCL 750.356c and 750.356d, has taken place or is taking place and reasonable cause to believe the person committed or is committing the violation, regardless of whether the violation was committed in the peace officer's presence.

(n) The peace officer has reasonable cause to believe a misdemeanor has taken place or is taking place on school property and reasonable cause to believe the person committed or is committing the violation, regardless of whether the violation was committed in the peace officer's presence. As used in this subdivision, "school property" means that term as defined in section 7410 of the public health code, 1978 PA 368, MCL 333.7410.

(2) An officer in the United States customs service or the immigration and naturalization service, without a warrant, may arrest a person if all of the following circumstances exist:

(a) The officer is on duty.

(b) One or more of the following situations exist:

(i) The person commits an assault or an assault and battery punishable under section 81 or 81a of the Michigan penal code, 1931 PA 328, MCL 750.81 and 750.81a, on the officer.

(ii) The person commits an assault or an assault and battery punishable under section 81 or 81a of the Michigan penal code, 1931 PA 328, MCL 750.81 and 750.81a, on any other person in the officer's presence or commits any felony.

(iii) The officer has reasonable cause to believe a felony has been committed and reasonable cause to believe the person committed it, and the reasonable cause is not founded on a customs search.

(iv) The officer has received positive information by written, telegraphic, teletypic, telephonic, radio,

electronic, or other authoritative source that a peace officer or a court holds a warrant for the person's arrest.

(c) The officer has received training in the laws of this state equivalent to the training provided for an officer of a local police agency under the commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.616.